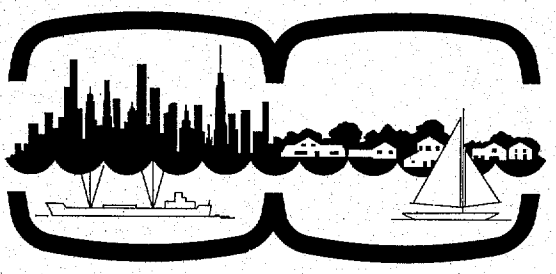
Second Year Work Product
Volume I
Legal Analysis



The Illinois Coastal Zone Management Program

Division of Water Resources
Department of Transportation

LIST OF SECOND YEAR WORK PRODUCTS

VOLUME I:	LEGAL ANALYSIS
VOLUME II:	COASTAL GEOLOGICAL STUDIES
VOLUME III:	BEACH & BLUFF PROTECTION
VOLUME IV:	COASTAL BIOLOGICAL STUDIES
VOLUME V:	COASTAL USE NEEDS & CAPACITIES
VOLUME VI:	PUBLIC PARTICIPATION

THE LEGAL FRAMEWORK:
TOWARD A MANAGEMENT PROGRAM

by
TAUSSIG, WEXLER AND SHAW, LTD.

submitted to:
THE ILLINOIS COASTAL ZONE MANAGEMENT PROGRAM

STATE OF ILLINOIS
DEPARTMENT OF TRANSPORTATION

June, 1976

THE LEGAL FRAMEWORK:
TOWARD A MANAGEMENT PROGRAM

A Report to the
ILLINOIS COASTAL ZONE MANAGEMENT PROGRAM
STATE OF ILLINOIS
DEPARTMENT OF TRANSPORTATION

The preparation of this Report was financed in part by the National Oceanic and Atmospheric Administration, United States Department of Commerce under the Coastal Zone Management Act of 1972, through the State of Illinois Department of Transportation, Division of Water Resources.

RICHARD L. WEXLER
ILENE DOBROW DAVIDSON
TAUSSIG, WEXLER AND SHAW, LTD.
LEGAL CONSULTANT

CONTENTS

ACKNOWLEDGMENTS

The preparation of this Work Product was enabled by the maximum participation of individuals whose contributions and criticisms were extremely meaningful, important and always constructive.

I wish to thank the members of the Lake Michigan Shoreline Advisory Committee whose dedication to their community of interest was inspirational. The continuing work of Robert Teska in reminding the author of the planning and management setting was vital to this Report's preparation and conclusions. I received the immeasurable help and encouragement of Harry Feehan and Eilene Mulaney, Counsel and Great Lakes Regional Coordinator, respectively, from the U. S. Department of Commerce, Office of Coastal Zone Management, for which I remain grateful. The continuing analysis of our work product by Kathy Scheele, Office of General Counsel, Illinois Department of Transportation, was a continuing prod to our further research.

To Donna Christman, Susan Moyer, Ralph Fisher, Mark Mugler and Chris Shafer, the Illinois Program Staff, go my special thanks for continuing to challenge me with new ideas, criticisms and their vitality. And to Peter Wise, the Program's Coordinator, goes my thanks and respect for leading by example--for taking on responsibility and discharging it responsibly.

Richard L. Wexler
Taussig, Wexler and Shaw, Ltd.
June 30, 1976

CHAPTER I
INTRODUCTION--THE CHANGING CONTEXT OF ANALYSIS

The Illinois Coastal Zone Management Program's First Year Legal Analysis was designed to contribute to the overall Program a detailed statement of Illinois' relevant legal structure--the wheel within which the spokes of the Program would be developed. In The Legal Framework: Lake Michigan and Its Shore, the authors articulated the "state of the law" as it now exists in Illinois and, often with reference to the emerging law of our sister states, indicated the trend of legal developments that will impact on the concepts of coastal zone management.

In the first year of our research and study we found:

> The Illinois Lake Michigan shore is but fifty-nine miles in length--in size one of the smallest coastal zones in the Nation. Yet, it is certainly the most urbanized and one that has been given no small degree of attention by the Illinois General Assembly, the courts, State agencies and the governing bodies of the municipalities bordering it. This small area, so affected with the public interest, presents, almost in microcosm, so many of the great issues of land use and planning law as to be almost a treasure trove for the lawyer: private and public property rights, the public trusteeship, environmental issues, government organization, home rule, and the fullest measure of land use control and acquisition techniques. Thus, with our mandate--to describe the state of the law of Illinois as it relates to the Lake and its shore--came our direction: to explore Illinois' laws, case and statutory, in full, as they relate to these issues so critical to the Lake, our State and the law itself.
>
> In the course of our research and analysis, we have found that the extreme pressures of urbanization in northeastern Illinois and the constantly changing concepts of public purpose and benefit as they impact on this most fragile and special natural resource lead to issues and conflicts that have, to date, been resolved too frequently in the courts. The lack of a clearly articulated State policy toward Lake and shore must and will be cured in the course of the Coastal Zone Management Program.

With the constant assistance and direction of the Program staff, commencing in September 1975, the authors turned their attention toward the development of a state policy toward Lake and shore that would be legally and technically defensible to be vested ultimately in the political and judicial crucibles in our State.

The singular approach to legal analysis is to: first, identify what the law is, then, identify the relevant facts; then apply the law to the facts; and, reach the necessary conclusion. In our first year, the authors, with notable assistance, identified the law in place while the program staff and consultants gathered the relevant facts. In this Report, the Program has begun the long and arduous process of application of rules of law to facts--the ultimate conclusions to emerge in the Third Year.

CHAPTER II
LOCAL GOVERNMENT PREROGATIVES IN THE COASTAL ZONE--
A STUDY IN THE NEED FOR LOCAL/STATE PARTNERSHIP

In the First Year Legal Analysis, we briefly touched on the implications of home rule[1] within the context of the zoning and subdivision regulatory processes. This first-cut analysis and the historic negative reaction of local and regional officials to other proposals for state involvement in regulatory systems,[2] demands an examination of the nature and extent of home rule authority in Illinois in the mid-70's. Although this section does not pretend to be a comprehensive examination of the totality of home rule--a task we leave to others[3]--our analysis requires an examination of home rule within the context of Illinois' urban history to gain a perspective of the implications this doctrine has for the Program.

1. Home Rule Emergent

The development of the home rule concept is viewed by most as the touch stone of a common sense process:

> The concept of 'home rule' emerged as a logical culmination of efforts to impose constitutional limitations upon the state's power to deal with local problems--efforts based principally upon general dissatisfaction with the common law status of local governments as wholly creatures of and subservient to the state legislature. The intensified urbanization of the nation in the latter part of the nineteenth century, fed by streams of immigrants from abroad and nurtured by the economic revolution growing out of technological changes, had produced a need for greatly increased governmental activity. As demands grew for more municipal services and for broader powers of local government, legislative authorizations were increasingly sought; avarice and corruption likewise played a significant role in competition for legislative favors . . . . Special legislation became the common order of the day. The inevitable reaction often took the form of limitations and restrictions on legislative powers, such as the common prohibitions against local and special legislation, examined above.[4]

Yet, home rule was also the "logical culmination" of a reaction to and against that hoaried principle of the law memorialized as "Dillon's Rule." Although the "rule" was a traditional one, its clearest enunciation was by Justice John Dillon of the Iowa Supreme Court:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . not simply convenient but indispensable.[5]

As a corollary to this rule, Dillon mandated that any reasonable doubts as to the existence of a power should be resolved against the municipal government[6]--a construction approved with vigor by the Illinois courts.[7]

Some form of municipal home rule now exists in at least nineteen states[8] other than Illinois. Although many observers of the home rule process have historically criticized the "movement" as " . . . out of harmony with modern ideas about public administration, which stress flexibility and adaptability in governmental arrangements,"[9] a critic has " . . . noted that interest in home rule, far from waning, has increased in recent years"[10] reaching its culmination in Illinois in 1970. Yet, in the context of the Lake Michigan shore certain criticisms of the home rule concept ring loud and clear:

> Recent developments in metropolitan areas have divested the concept of home rule of much of the sanctity it possessed at various times in the past. The values of maximum citizen participation and local control implicit in home rule are in tension with the limited ability of small units of government to meet modern service standards, with the spread of public policy concerns to the metropolitan scale, and with the poor public performance that often results from divided authority. Effective local control--the goal of home rule advocates--often requires a larger jurisdiction than the typical local unit.[11]

Yet, even with criticism, none can deny the true viability of the home rule concept in Illinois today, nor the opportunities home rule provides to enhance the operation of our cities and villages. This realization was nowhere better expressed than in the report of the Local Government Committee of the Sixth Illinois Constitutional Convention:

> The fundamental reason for favoring home rule over the existing system of legislative supremacy is this: Local governments must be authorized to exercise broad powers and to undertake creative and extensive projects if they are to contribute effectively to solving the immense problems that have been created by increasing urbanization of our society.[12]

These conflicts between critic and advocate emerged on the convention floor and in the proceedings giving rise to the context for constitutional home rule in our state.

2. The Constitutional Framework: Negative and Positive Preemption

Local political fragmentation, the constraints of Dillon's Rule,[13] added to the legislative restraints upon local units imposed by the Illinois General Assembly combined in the mid-century to catalyze a major effort to include within any constitutional revision a strong home rule article. This movement, if you will, reached its logical apex in the 1970 constitution of Illinois:[14]

> SECTION 6. POWERS OF HOME RULE UNITS
>
> (a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.
>
> (b) A home rule unit by referendum may elect not to be a home rule unit.
>
> (c) If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction.
>
> (d) A home rule unit does not have the power (1) to incur debt payable from ad valorem property tax

receipts maturing more than 40 years from the time it is incurred or (2) to define and provide for the punishment of a felony.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law. A home rule county shall have the power to provide for its officers, their manner of selection and terms of office in the manner set forth in Section 4 of this Article.

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (1) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

(j) The General Assembly may limit by law the amount of debt which home rule counties may incur and may limit by law approved by three-fifths of the members

elected to each house the amount of debt, other than debt payable from ad valorem property tax receipts, which home rule municipalities may incur.

(k) The General Assembly may limit by law the amount and require referendum approval of debt to be incurred by home rule municipalities, payable from ad valorem property tax receipts, only in excess of the following percentages of the assessed value of its taxable property: (1) if its population is 500,000 or more, an aggregate of three percent; (2) if its population is more than 25,000 and less than 500,000, an aggregate of one percent; and (3) if its population is 25,000 or less, an aggregate of one-half percent. Indebtedness which is outstanding on the effective date of this Constitution or which is thereafter approved by referendum or assumed from another unit of local government shall not be included in the foregoing percentage amounts.

(l) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

(m) Powers and functions of home rule units shall be construed liberally.[15]

As one observer of the constitutional process has noted: "The Local Government Committee . . . felt that careful draftsmanship would help to avoid many of the problems faced by home rule in other states."[16] Because the judiciary in other "home rule states" remained inextricably tied to Dillon's Rule, the courts had become confused as to state authority vis-a-vis local powers[17]--thus, the clear negation of Dillon's Rule in Section 6(a); the broad explanation of the methodology of preemption in Sections 6(g) through (i); and the express application of all existing laws to home rule units until certified pursuant to the Constitutional Transition Schedule.[18]

Thus, the Constitution, as enacted, provides within the ambit of home rule the broadest conceivable grant of substantive constitutional powers coupled with a precise legislative methodology and responsibility for preemption. The Local Government Committee made abundantly clear, in proceedings before it, that the home rule grant under the Constitution created a broad area of substantive inherent power within home rule units that were self-executing--requiring no action by the General Assembly.[19] The Section 6 powers fall into two categories:

1. A general grant of all powers and functions pertaining to the home rule unit's government or affairs; and

2. A specific grant of the powers of regulation, taxation, licensing and debt.

While the general grant is obviously broad enough to obviate the need for specificity; " . . . nonetheless, the specific grant was necessary to indicate that certain basic powers are unquestionably granted to home rule units."[20] Although similar grants are found in the constitutions of South Dakota, Massachusetts and Arkansas, for example, " . . . none of these is as comprehensive as the Illinois grant."[21]

The preemption sections are offered as " . . . a unique solution to the problem of balancing state and local power."[22] Denial to the home rule units of the right to exercise a power not exercised by the state must be accomplished by a three-fifths majority vote in both houses of the General Assembly. A three-fifths majority vote in both houses is also required for the denial or limitation of a taxing power, other than the taxing powers specifically limited in Section 6(e). However, when the legislature deems an area other than a taxing power, to be of statewide concern, it may pass a general law expressing state exclusivity in this area by simple majority vote of both houses. The concurrent exercise of a power by both the state and home rule units is permitted except as limited or declared exclusive by the legislature. Theoretically, almost any area may be preempted by the state, but the three-fifths voting requirement will make preemption of powers not exercised by the state and of taxing powers difficult.[23] Professor David C. Baum, counsel to the Local Government Committee at the Constitutional Convention explained further the intent and thrust of Illinois' preemption provisions:

> The design of Section 6 places great responsibility upon the legislature to ensure that home rule does not degenerate into provincialism which could injure the people of the state. The emphasis on legislative authority to limit home rule, plus the specification of ways in which the legislature must

> act to assert its authority, makes the Illinois home rule provision unique. Judicial limitations imposed on home rule in other states should not be very persuasive in Illinois because of our unique approach to the problem.[24]

3. "Pertaining to its Government and Affairs"--The Built-In Preemption

The major limitation of Section 6 is the restriction on a home rule unit's exercise of powers to the municipal corporation's government and affairs.[25] The Local Government Committee recognized this restraint stating that "[T]he intent of this draft . . . is to give broad powers to deal with local problems to local authorities."[26] The Committee recognized:

> It is clear . . . that powers of home rule units relate to their own problems . . . . Their powers should not extend to such matters as divorce, real property law, trusts, contracts, etc., which are generally recognized as falling within the competence of state rather than local authorities.[27]

As it pertains to the police power, the Committee acknowledged the grant of power to be compatible with that found in Ohio,[28] stating further that "no objections have been raised to vesting this basic 'police power' in home-rule municipalities and counties."[29]

The question of what constitutes a home rule unit's "own problems" has been addressed by the Illinois courts. Although the issue of "[w]hether or not land use controls pertain to the government and affairs of municipalities exclusively is one of the major issues still to be settled by the courts in interpreting home rule in Illinois,"[30] the answer is slowly developing first in other home rule states and, now, in Illinois, to the point where conclusions can begin to be drawn.

Prior to the enactment of the 1970 Constitution, Illinois counties were forced to issue tax anticipation warrants to finance purchases made prior to the receipt of real estate tax proceeds. These warrants required substantial interest payments. Cook County, the sole home rule county under 6(a) passed an ordinance providing for the payment of county real estate taxes in four rather than the two installments required by state statute[31] in an attempt to obviate the need for interest payments on the warrants by the county and the units of government for which the county is the tax collection agent. The issues, then, before the Illinois Supreme Court in Bridgman v. Korzen[32] were whether

tax collection procedures pertained to the county's government and affairs and, therefore, whether the home rule authority contemplated the county's collection ordinance. The court, clearly confused by the intergovernmental aspects involved, held that as the county was acting not only on its own behalf but also on the behalf of other taxing bodies, the function being performed could not and did not pertain solely to its government or affairs:

> Although obviously there are powers and functions of county government which pertain to its government and affairs within the contemplation of Section 6 of Article VII, the collection of property taxes is not one of them. In the process of collecting and distributing tax monies the county acts both for itself and the other taxing bodies authorized to levy taxes on property within the county, and the function thus performed does not pertain to its government and affairs to any greater extent than to the government and affairs of the other taxing bodies for whose benefit it acts. We find no provision in the constitution of 1970 or in the proceedings of the convention which leads us to believe that the collection of property taxes is a home-rule power or function within the contemplation of Section 6 of Article VII.[33]

Thus, though the court had earlier proven its willingness to hold that a local home rule action may supercede the effects of a conflicting state law antedating the 1970 Constitution,[34] the context for such action appeared to be delimited by a fair, if narrow, construction of the "government and affairs" language.[35] For the Coastal Zone Management Program, however, a series of decisions impacting upon home rule units through this construction is vital for true comprehension of the extent of home rule power in Illinois today. Bridgman was merely a portent of things to come.

The Local Government Committee readily recognized that certain regulatory processes mandated greater than local management:

> Control of air and water pollution, flood plains and sewage treatment are often cited as important examples of areas requiring regional or statewide standards and control.[36]

Even though the Committee further acknowledged that:

> [At] the same time, it is quite conceivable that both the state and various local governments can regulate

> the same activities and carry on the same or related functions without conflict or difficulty.[37]

It soon became clear, through court decisions, that the State/local relationships would come into conflict. Thus, in 1974, the City of Chicago, as a home rule unit contended, in City of Chicago v. Pollution Control Board:[38]

> that its municipal disposal sites and incinerators are not subject to the provisions of the Environmental Protection Act because (1) the City is a home-rule unit under Article VII of the Constitution, (2) the collection and disposal of garbage and waste is a governmental function within its home-rule powers and (3) the General Assembly has not acted pursuant to Article VII to restrict the City's exercise of these home-rule powers.[39]

The defense responded, contending that Section 1 of Article XI of the Constitution vested exclusive legislative authority in the environmental field in the state[40] and, further,

> that environmental and pollution matters do not pertain to the 'government and affairs' (see Ill. Const. (1970), art. VII, sec. 6(a)) of home-rule units, and that the State has preempted this area in the Environmental Protection Act.[41]

Citing the Committee language above, the court held that the state legislation was not preemptive but a concurrent exercise of power, with a critical finding appended thereto:

> The State has legislated in this field by the adoption of the Environmental Protection Act, which did not express the intent that the State should exclusively occupy this field, but rather provided in section 2(a)(iv) (Ill. Rev. Stat. 1973, ch. 111 1/2, par. 1002(a)(iv)) that it is the obligation of the State Government 'to encourage and assist local governments to adopt and implement environmental protection programs consistent with this Act.' We conclude therefore that a local governmental unit may legislate concurrently with the General Assembly on environmental control. However, as expressed by that portion of the constitutional proceedings referred to above, such legislation by a local governmental unit must conform with the minimum standards established by the legislature.[42]

Thus, in clear language, the Illinois Supreme Court held not for the first time nor the last,[43] that the State may set minimum standards to be followed by home rule units in the protection of the environment.

Although the question of defining "its government and affairs" has arisen in both the financial[44] and land use[45] regulatory schemes of home rule units, we may address the question strictly within the land use, environmental and regulatory context that confronts the Program. Observers of land use nationally have noted that, typically, zoning is the exercise of a parochial regulatory power:

> Surely there are few matters which are of less statewide concern and which are more local in scope than zoning . . . .[46]

Among home rule states it is seemingly well-established that zoning is a matter of local concern rather than of statewide interest[47] but the question remained open in Illinois. Professor Clyde Forrest of the University of Illinois predicted the answer in 1973:

> It would appear from the evidence of broad intent and the lack of statutory mandate that the decisions should be affirmative.[48]

At the end of 1974, in Johnny Bruce Co. v. City of Champaign,[49] the Illinois courts reached agreement with Professor Forrest. Citing hoaried Illinois case law on " . . . the province of the municipality" to make land use decisions,[50] the court concluded that:

> . . . the city of Champaign (ed., a home rule unit) in the adoption of its general zoning ordinance or an amendment thereto . . . is not limited in the exercise of its power by the then existing enabling statutes. It has plenary power in this regard. The precise procedure for the exercise of this power and the resolution of zoning problems must be left to the local exercise of this new constitutional grant of power.[51]

Although this decision resolved the issue as to the home rule unit's exercise of zoning power within the unit's boundaries, questions still lingered as to whether these powers might be exercised beyond the corporate limits or upon matters of greater than local concern.

In a 1972 opinion, the Illinois Supreme Court had seemingly opened the door to extra-territorial regulatory action by a home rule unit with its decision in People ex rel. City of Salem v. McMackin.[52] Herein, the act of a non-home rule unit in acquiring property outside of its corpor-

ate limits pursuant to the Illinois Industrial Project Revenue Bond Act[53] and proposing to develop and lease the same to private industry was challenged. After finding the public purpose required of such an act, the court held:

> Where not expressly prohibited, a municipal corporation may purchase real estate outside of its corporate limits for legitimate municipal purposes.[54]

The plaintiffs argued that the Act in question was unconstitutional as special legislation in that home rule units could not under Article VII, Section 6(a) similarly acquire land beyond its borders. The court rejected this argument as specious:

> The language of the constitution in the grant of power to home-rule units may raise some questions as to the extent of power to exercise sovereignty beyond corporate limits, but the language does not warrant the inference that a home-rule municipality is unable to act in a proprietary capacity beyond its corporate limits . . . . Since neither the Act in question nor the constitution prohibits a home-rule unit from adopting a similar enactment, we do not find a denial of due process or equal protection of the law, nor do we find special legislation resulting from the Act.[55]

Although the court in City of Salem went to great lengths to distinguish between proprietary acts--which may have extraterritorial impact--and governmental acts--which may not so impact[56]--some home rule units saw the decision as opening the door to extraterritorial zoning. This door was now to be closed.

In City of Carbondale v. Van Natta,[57] Carbondale, a home rule municipality, argued that Article VII Section 6(a) empowered it to regulate under its zoning power " . . . within a 1 1/2 mile area beyond and contiguous to its boundaries."[58] The Illinois Supreme Court noted:

> At the constitutional convention the Committee on Local Government recommended that the grant of powers in Section 6(a) contain the specifically limiting wording 'within its corporate limits' . . . . The intendment shown is that whatever extraterritorial governmental powers home-rule units may exercise were to be granted by the legislature.[59]

The City-appellant argued that City of Salem supported its contention but Justice Ward, speaking for the majority,[60] rejected this argument outright, stating that in City of Salem:

> . . . we specifically distinguished extraterritorial acts which are proprietary in character from acts which are governmental . . . .[61]

With Van Natta's publication it became fair to conclude that a home rule unit's regulatory powers stopped at its boundaries and, pursuant to Johnny Bruce, the land use regulatory power generally rested in home rule units as did other home rule powers. Yet, City of Chicago v. Pollution Control Board continued to be the grey cloud in an otherwise all blue home rule sky--were there instances where even the most fixed of home rule regulatory powers would be restrained by state action or state interest? In other words, could the exercise of a home rule power be delineated by the nature of the act or the nature of the object of the regulation?

In City of Highland Park v. County of Cook[62] the Illinois Appellate Court had the opportunity, under a complex set of facts, to test the limits of home rule regulatory authority. Highland Park, a home rule municipality, sought to enjoin the County from constructing a highway within its corporate limits. The City contended that under the Highway Code the County was required to obtain approval of a municipality of over 500 persons before constructing, altering or maintaining a highway within its corporate limits, which approval had not been obtained.[63] The City also contended that under its home rule power, it had the power to, and did enact an ordinance requiring prior approval by the City, which approval had not been obtained. The Court reversed the injunction relating to outlets in Red Oak Lane and Ridge Road and affirmed the denial of the City's motion for an injunction as to improvements on Lake-Cook Road. The Court noted that the City did not contend that Lake-Cook Road was a City road. The Highway Department has long taken the position that Cook County controls the entire right-of-way and it was maintained solely by the County using State funds as it was designated as a State-aid road. No County Highway funds were being expended--solely State funds.

The court reasoned that the Illinois Highway Code reflects the carefully stratified system of control over the designation, planning, construction and maintenance of the highways, roads and streets throughout the State. It specifies the respective responsibilities of the State, acting through its Department of Transportation, and each of the three levels of local government--counties, road districts and municipalities. It also spells out the relationship between these four levels of government, including the coordination of their action so as to assure a systematic approach to the task of providing a workable system of highways and roads throughout the State. The court stated that, as these provisions reflect, it is the role of the Counties, not the municipality, to make decisions and enter into agreements with the State regarding the designation, planning, construction and repair of County highways and responsi-

bility for the County Highway System is given to the various County Boards. "County Highway System" is defined to include all highways designated as county highways. Municipalities are limited to dealing with highways and roads not included in the State or County Highway Systems. Under the Code, Counties have the power to locate and extend county highways into and through municipalities and they may designate existing streets as extensions of county highways.

The court held that the only part of the State Public Highway System over which a municipality has any jurisdiction is "Municipal Street Systems"--e.g., streets in municipalities which are not part of the County or State Highway System--stating that any other result would produce chaos. It further noted that to permit any municipality over 500 persons to prevent an improvement to an existing county highway where it is being performed by a County with all necessary approvals from the State would violate and jeopardize the systematic structured approach to the designation, construction and maintenance which is the foundation of the State Highway Code. While the plaintiffs had relied upon Chapter 121, Section 5-408, the court held it had no application to the facts in the case before it, since that statute only applied when county funds were being used to construct the street.

The City's second contention was that under home rule powers it had the power to and did enact an ordinance requiring prior approval by the municipality before the County could construct a highway through its corporate boundaries. The court noted that while the State Constitution Article VII Section 6(a), states that, "except as limited by this section, a home rule unit may exercise any power, perform any function pertaining to its government and affairs including, but not limited to the power to regulate for the protection of the public health, safety, morals and welfare . . ." this only expanded the home rule powers over strictly local affairs, not those involving other municipalities, the County or the State. Quoting Kurt Froelich, Illinois' most ardent observer of the home rule process, the court adopted a narrow view of the extent of the power:

> A home rule unit may exercise any power and perform any function 'pertaining to its government and affairs.' The government and affairs language was clearly intended as a limit on home rule powers.
>
> * * * Implicit in the words 'pertaining to its government and affairs' was the concept that matters of state concern or national concern are not within the ambit of the home rule grant * * * many matters, even clearly of concern to home rule units, should be left to the determination of the General Assembly.[64]

The Highland Park ordinances at issue, the court felt:

> . . . require not only persons and corporation[s] (sic) but 'any unit of local government' other than itself, to obtain the approval of the City Council before commencing any 'installation, construction, reconstruction, repair or replacement of any road, way, thoroughfare, easement or place open to the use of the public for the primary purpose of vehicular traffic.'[65]

This, the court held, went far beyond constitutional limits:

> If held valid and applied to the factual situation present in the case at bar, they (ed., the ordinances) are intended to and will affect the affairs of the County, the State and other municipalities and, in our opinion, therefore are not, as they must be, limited to the City's own affairs.[66]

Critically important is the recognition by this court of analogous Ohio precedent--demonstrating, once again, similarities between Illinois and Ohio home rule regimes.[67]

A dissent magnified the impact of the Highland Park decision, observing that the majority's "pertaining to" language restricts the home rule unit's sphere of power to "strictly local affairs" having no affect upon any other governmental unit.[68] Judge Seidenfeld in a well-reasoned dissent, noted that Article VII, Section 6(c) gives priority to a municipal ordinance within its jurisdiction when it conflicts with a County ordinance. If Section 6(a) is limited to subjects without extra-jurisdictional affect, it was reasoned, the 6(c) priority section would be unnecessary. The dissent also noted that Section 6(i) allows home rule units to share concurrent power over a subject with the State so long as there has been no State preemption and the subject matter pertains to the home rule unit's government and affairs and not to the problems particular to the state or nation. Furthermore, Section 6(m) states that the powers and functions of home rule units shall be construed liberally. As Judge Seidenfeld pointed out, the majority's analysis that only subjects upon which a home rule unit may exercise its powers are those strictly local problems, the regulation of which will have no effect upon any other governmental unit is contradicted by the structure of the entire home rule section of the constitution. The dissent also noted that the court in City of Chicago v. Pollution Control Board,[69] rejected an argument by the Illinois Pollution Control Board that environmental and pollution matters did not pertain to the government and affairs of home rule units. If pollution, with its extra-territorial effect and its comprehensive regulation by the State, may additionally be regulated at the municipal level, then county roads should likewise be subject to municipal regulation.

Although the court's language indicates that a municipality cannot regulate matters that also affect other governmental units, this should not be taken as a blanket statement, but should be reviewed in terms of the facts of the case. The court placed great emphasis on the structure of the Illinois Highway Code and its comprehensive nature. At the current time, the State has no similar system regarding the management of the coastal resources. Yet, the impact of the decision is clear--actions of home rule units which impact extra-territorially and, therefore, upon other units of government will be carefully examined by the courts and will not be given the liberal construction otherwise mandated by Article VII Section 6(m). To this extent, Illinois' home rule experience is definitely consistent with the doctrine as applied in other states.

4. " . . . Of More Than Local Interest"--
The Home Rule Experience Elsewhere

One of the keys to any coastal zone management solution is a basic comprehension that the law requires that statewide resources require management at a level of government higher than local. This thought is neither new to Illinois--as is evidenced by the discussion above and the emerging case law--nor alien in any way to the concept of home rule in our State. States which have a longer history of home rule applications have reached identical conclusions.

By constitutional amendment, the powers of Ohio municipal corporations have been enumerated in the Ohio Constitution since 1912. Article XVIII, Section 3 of the Ohio Constitution provides " . . . municipalities shall have authority to exercise all powers of local self-government,"[70] defined in the first court test of home rule:

> As to the scope and limitations of the phrase 'all powers of local self-government,' it is sufficient to say here that the powers referred to are clearly such as involved the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of a particular municipality.[71]

As is true in Illinois today:

> This definition was characteristic of later judicial attempts to define the pertinent phrase, but failed to provide any specific standards to facilitate its application either by the courts or by a municipal government.[72]

However, in 1958, the Ohio Supreme Court developed a working definition of "powers of local self-government" that were obviously parroted without attribution by the Illinois court in Highland Park some seventeen years later:

> To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extra-territorial affects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the general assembly.[73]

This concept--known in Ohio as "the doctrine of state-wide concern"[74] is clearly applicable to Illinois. Under this doctrine in Ohio, if a matter traditionally placed in the ambit of local, home rule control, takes on new significance and impacts beyond the boundaries of a given unit of local government, the matter is subject to general state legislation and subject to state-wide control.[75]

A strong tradition of home rule and local self-determination exists in the State of California as well.[76] In People ex rel Younger v. County of El Dorado,[77] the California Supreme Court was asked by several counties to hold the Tahoe Regional Planning Compact unlawful as violative of the state constitutional grant of home rule authority. The Court refused, noting that the California home rule authority granted " . . . broad powers over purely local affairs,"[78] and concluding, in language so apropos the Lake Michigan context as well as Tahoe:

> The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole.[79]

A further contention of the home rule units was that the regulatory powers of the Agency unlawfully conflicted with local zoning and police power exercise. Rejecting this argument, the California court found:

> It is beyond dispute . . . that the powers as to planning and zoning which the (home rule units) single out as violative of the Constitution are not powers local in nature and purpose.[80]

In strong and poetic language this court directed the home rule units' attentions outward in an expanded concept of regional and state-wide concern:

> Furthermore, problems which exhibit exclusively local characteristics at certain times in the life of a community, acquire larger dimensions and changed characteristics at others. 'It is * * * settled that the constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate.' When the effects of change are felt beyond the point of its immediate impact, it is fatuous to expect that controlling such change remains a local problem to be solved by local methods. Old attitudes confer no irrevocable license to continue looking with unseeing eyes.[81]

Although, perhaps, more eloquent, concepts of "local government and affairs" in California and Ohio are not truly different than in their more embryonic state in Illinois. But where does this lead us?

5. Greater Than Local Resources In Illinois: The Public Trust Applied

We have dealt extensively with the public trust doctrine in the First Year Program.[82] While there is little value in repetition, a brief synopsis of the concept and its Illinois history will focus on statewide, regional and local interests in the management of our most valued resource in Illinois--Lake Michigan.

> The scattered evidence, taken together, suggests that the idea of a public trusteeship rests upon three related principals. First, that certain interests--like the air and the sea--have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economomic

> status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.[83]

As Professor Joseph Sax has so aptly indicated, the trust doctrine, as it developed in American law has struck a balance which is designed to retain the largest measure of public use consistent with needful development and industrialization, although this standard is more easily described than defined.[84]

a) The Public Trust Doctrine

Sax, now of the University of Michigan Law School, has been, historically, the most avid student of the public trust doctrine. In one of his major works on the subject, Sax has made the following critical observation:

> Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems. If that doctrine is to provide a satisfactory tool, it must meet other criteria. It must contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of interpretation consistent with contemporary concerns for environmental quality.[85]

The public trust doctrine is as old as the law itself--at least the law as we know it. We trace the trust back to ancient Roman law. Yet, the landmark case in the United States on the public trust is one that arose in the context of one of Illinois' most valuable and valued assets--Lake Michigan's shore line. No more thorough exploration of American law on the subject can be found than in Illinois Central v. Illinois.[86]

Appeals to the United States Supreme Court were taken from a decree in a bill filed by the State of Illinois against the railroad, the City of Chicago and the United States to determine the rights of the parties in and to certain submerged or reclaimed lands in Lake Michigan lying east of the water line of the City.

In 1850, Congress had granted land to the State of Illinois to aid in the construction of a railroad. In 1851, the Illinois Central Railroad was incorporated pursuant to a private law and was authorized to

appropriate to its sole use and control a 200 foot wide right-of-way in and along Lake Michigan. In 1852, the City of Chicago, by ordinance, consented to the railroad entering the City "along the margin of the lake, within and adjacent to the same" and granted to the railroad a 300 foot right-of-way not less than 400 feet east of the west line of Michigan Avenue and parallel thereto. This ordinance allowed the railroad to fill out into the Lake and in 1856, the City granted the railroad permission to enter and use in perpetuity the space between its then present breakwater and the river (an area north and east of the present Randolph Street). In 1869, the Illinois legislature passed the so-called "Lake Front Act." The Act purported to do much, but most importantly, section 3 of the Act "confirmed" title in or conveyed to the railroad all right, title and interest of the State in and to the bed of Lake Michigan lying east of the railroad right-of-way for a distance of one mile and bounded by Randolph Street on the north and by Park Row (11th Street) on the south. The title was to be held by the railroad in perpetuity. The City balked at going along with the statute and some litigation ensued. In 1873, the legislature repealed the 1869 statute.

In Illinois Central, the State sought a decree confirming its title to the bed of Lake Michigan and its sole and exclusive right to develop the Chicago Harbor as against the railroad's claim that it had absolute title to those submerged lands described in the Act of 1869, and the right to fill in the bed of the Lake for purposes of its business activities. The City, in a cross-bill, insisted that since 1839 it had the control and use of what is now Grant Park. It sought a declaration that it was the owner of the fee and of riparian rights appurtenant to the park; that it had the exclusive right to develop the harbor of Chicago and that the railroad be enjoined.

United States Supreme Court's opinion first noted that the object of the suit was to determine the title of certain reclaimed lands and the submerged lands which were the subject of the 1896 statute.[87]

The Court first noted that:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states . . . .[88]

The Court held that the same result obtained as to the Great Lakes upon the theory of state dominion. The Court said, it would examine how far such dominion had been encroached upon by the railroad; how far that company had the assent of the State to such encroachment; and the validity of the right to further encroachment.[89]

As to the railroad's 200 foot right-of-way, the Court held that it had been constructed under lawful authority but that the railroad

never acquired by its reclamation an absolute fee title but only an easement of right-of-way for railroad purposes.[90] Furthermore, the railroad acquired by virtue of the easement of right-of-way no riparian rights to reclaim lands from the waters of the Lake for its use or for the construction of piers, wharves, docks and other facilities.[91]

The railroad had acquired fee title to some lands fronting on the Lake north of Randolph Street and between 12th and 16th Streets and had reclaimed some of the adjacent submerged lands and constructed slips, wharves and piers. The railroad claimed ownership and the right to use the facilities. The Court held that there was a right to "wharf out" to the point of navigability. But in the instant case, no evidence was ever adduced as to the point of navigability, or at least no public authority had ever established such a point.[92]

The railroad's claim to the submerged lands in the Chicago Harbor was based on the Act of 1869. The primary questions to be decided were the validity of that Act and the validity of the 1873 statute repealing the prior Act. As to the "confirmation" of title, the Court held that the confirmation could not be involved so as to extend the railroad's riparian rights to the shore south of Randolph Street and north of 12th Street. The Court first framed the question presented as:

> . . . whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters . . . .[93]

To pose the question was to answer in the negative.

The Court reiterated that the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water by the common law. In addition, that title necessarily carries with it control over the waters above them whenever the lands are subjected to use:

> But it is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties.[94]

The Court distinguished between the situation in which the disposition of submerged lands is made to facilitate improvement of navigation and commerce, which is permissible, and the situation whereby the disposition causes the State to abdicate its general control over lands under its navigable waters, which constitutes an impermissible exercise of power:

> Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[95]

Thus, the conveyance itself is subject to, impressed with, if you will, the trust. As to the public trust, the Court stated:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, then it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.[96]

The Illinois Central argued that a contract existed for the rights to the Lake by virtue of the 1869 Act. The Court scoffed at this argument and held that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, by the Act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof. Furthermore, it found that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective:

> There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.[97]

Sax, in reviewing Illinois Central concluded:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.[98]

Yet, the Court expressed more than "skepticism:"

> What a State may not do, the Court said, is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power; to grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation.[99]

Within the decade of the 1892 Illinois Central decision, the railroad had two other occasions to visit the Supreme Court in connection with its Lake Michigan/public trust-related activities.

First in United States v. Illinois Central Railroad Co.,[100] the federal government sought to enjoin the railroad's diversion of Grant Park to non-park uses. The Court in this case held that the United States was not a proper party to invoke the trust as the United States did not possess jurisdiction to control or regulate, within a State, the execution of trusts or uses created for the benefit of the public.[101]

Thus, it was left to the State to protect the public trust and in 1900, in Illinois Central Railroad Company v. Chicago,[102] the United States Supreme Court affirmed an Illinois Supreme Court decision that asserted the public trust with greater specificity and greater direction for us even in 1975, than did its earlier more famous opinion.

Suit had been filed by the railroad to enjoin the City from interfering with the filling in of certain submerged lands by the Illinois Central in front of property owned by the railroad between 25th and 27th Streets. The purpose of reclamation was to erect an engine house and locomotive stalls.

The Court took a strict (if not dim) view of the matter:

> The position of the railroad company under these sections (of the charter), presupposing as it does a vested, continuing and irrevocable right for all time, to use such of the shallow waters and submerged lands of Lake Michigan as it may now or hereafter find to be necessary to the proper and complete operation of its road, and a surrender by the city of all power of interference is certainly a somewhat startling one.[103]

The Court said that the railroad was arguing that what the State could not do directly, the railroad may now do piecemeal:

> take the whole water front of the city to the limit of navigation for the operation of the road, and that, too, without the consent and against the protest of the city. If such authority be possible, it should be granted in the clearest and most unmistakable language.[104]

Construing the charter, the Court did not find any such language. The reference in the charter to "lands and streams" or "lands and waters" which may be entered upon by the railroad for appropriate purposes, did not include Lake Michigan.[105] The Court so held because absent local law, custom or usage, grants of land (of which the charter was one) do not pass title to submerged lands below the high water mark (or, in the case of Lake Michigan, lands under or forming the bed of the Lake) unless there is specific language in the grant passing title. The Court examined Illinois law and found nothing in the State's custom or usage to support the railroad's claim and held that the charter was simply not precise enough on the point. The custom had been for the City to approve entry by the railroad on to various lands, including the first such entry which was the subject of an ordinance passed in 1852.

The term "waters," as used in the Charter, the Court held, referred to "streams" but not "lakes." Under Illinois law, streams and lakes were quite different things.[106]

> It is incredible that, if the General Assembly had intended to authorize the company to take possession of submerged lands, as it found it necessary or convenient so to do, it would not have employed more explicit language to that effect.[107]

But even if the Charter was to be broadly construed, by its very terms, the railroad still needed the approval of the Chicago city council to fill in the lands.[108] The Court rejected the argument that since the corporate boundaries of the City did not in 1851 extend to 25th Street,

approval of the particular construction here was not required. The Court held that the Charter did not freeze things in effect as of 1851.

The impact of the 1900 Illinois Central decision is too often overlooked in public trust law analyses.[109] Yet, this 1900 decision is of critical import:

1. The facts in the 1892 case were " . . . particularly egregious"[110]--the grant of over 1,000 acres (one square mile of submerged lake)--whereas in the 1900 decision only 4 to 5 acres were involved; and

2. In the 1892 decision, the Court did not require detailed legislation as a condition of any disposition--in the 1900 decision the Court so emphasized--a theme that has been common to "the contemporary doctrine of the public trust."[111]

Both the 1892 and 1900 decisions, together, provided Illinois and the nation with as broad a public trust doctrine as have any developments in other state courts since. Given a legislative mandate concerning the Lake coupled with this case law, one would be free to conclude that intrusions on the public trust in Illinois would not be permitted. The growing pressures on urban land use in Illinois in the 20th century were, however, to pressure the doctrine as well.

Of direct impact on the doctrine were a series of opinions confronting the public trust more directly.

First in 1958, the Illinois Supreme Court was asked to overturn a trial court decision approving both the funding of the original McCormick Place and its location--on lands reclaimed from the bed of Lake Michigan. In Fairbank v. Stratton,[112] the court dismissed the contention that the use of the reclaimed bed for an exposition hall violated the public trust in a summary manner:

> We recognize that submerged lands reclaimed are impressed with a trust in the public interest. However, the facility here contemplated is in the public interest and has been approved by the proper authorities. Under circumstances such as these we find no violation of that trust.[113]

In 1966, in Droste v. Kerner,[114] the court was called upon to adjudicate the public trust in the context of the conveyance, pursuant to state legislation[115] of 196.40 acres of submerged Lake Michigan bed to the United States Steel Corporation. Although the court determined that the

taxpayer plaintiffs had no standing to raise the public trust issues, Chief Justice Klingbiel, speaking for the majority, felt it necessary to speak to the issue of the trust at some length in rejecting the plaintiff's arguments that, to the casual reader, seemed so consistent with the 1892 Illinois Central opinion. While the court found that the submerged land was held by the State of Illinois in trust to protect the rights of the public in the use of the navigable waters:

> This did not mean, however, that the shoreline was required forever to remain unchanged except by natural causes . . . .
>
> The proper execution of this public trust with respect to submerged lands requires that the conveyance of any particular parcel to a shore owner be consistent with the public interest and not impair the interest of the public in the lands and waters remaining. It would not be possible for the State to make that determination in the administration of the trust unless it has the power to specify the individual or corporation to whom the submerged lands are to be conveyed.[116]

The court went on to properly distinguish the 1900 Illinois Central case, citing the lack of specific legislative authority which had been cured by the General Assembly:

> . . . we point out that the legislature, in section 1 of the present statute, expressly declared that 'the grant of submerged land contained in this Act is made in aid of commerce and will create no impairment of the public interest in the lands and water remaining, but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the People of the State of Illinois.' The act was duly approved by the Governor and, prior to its passage and approval, the Chicago City Council had unanimously adopted a resolution urging the statute's enactment. We cannot assume that the legislative finding contained in section 1 of the act was factually incorrect or that it was not made in the utmost good faith.[117]

But for an articulate and vigorous dissent by Justice Schaeffer, proponents of the public trust doctrine as a viable vehicle for shoreline protection in Illinois might have run up the white flag upon a reading of Droste. Was the Lake Michigan shore now to be fair game to every private developer or entrepreneur; to the whim of a changing legislature;

were the pious statutory pronouncements of public trust to be observed more in the breach? A case was soon to reach the Court--curiously involving a non-lakefront Chicago park--whose dicta would raise expectations as to the trust's potential as much of Droste's dicta dashed them.

In 1970, just four years post-Droste, the Chicago Public Building Commission in concert with Chicago's Park District and Board of Education, proposed to develop almost four acres in Washington Park with a school/gymnasium facility. This conversion of park land to another public use was challenged by a group of taxpayers in Paepcke v. Public Building Commission.[118] The trial judge, relying on Droste, held that the plaintiffs lacked standing to maintain the action in their posture as taxpayers.

The Supreme Court reversed its prior position clearly and without equivocation.

> Upon serious reconsideration of this question we now believe that portion of the opinion in Droste dealing with the right and standing of the plaintiff to sue should be overruled, as should any other former decisions of this court holding that a citizen and taxpayer has no right, in the absence of statute, to bring an action to enforce the trust upon which public property is held unless he is able to allege and prove special damage to his property. If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.[119]

Relying heavily on Professor Joseph Sax's writings on the public trust,[120] the Court drove hard at a distinction between conveyances of trust property to private parties as opposed to the division of public uses of trust property to other public uses and emphasized the need of government to reallocate resources in approving the Public Building Commission/Park District action. Even so, Justice Burt, speaking for a unanimous Court, felt impelled to point a path for the future:

> In passing we think it appropriate to refer to the approach developed by the courts of our sister state, Wisconsin, in dealing with diversion problems. In at least two cases, City of Madison v. State, 1 Wis. 2d 252, 83 N.W. 2d 674; and State v. Public Service Com. 275 Wis. 112, 81 N.W. 2d 71, the Supreme Court

> of Wisconsin approved proposed diversions in the use of public trust lands under conditions which demonstrated (1) that public bodies would control use of the area in question, (2) that the area would be devoted to public purposes and open to the public, (3) the diminution of the area of original use would be small compared with the entire area, (4) that none of the public uses of the original area would be destroyed or greatly impaired and (5) that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility. We believe that the present plans for Washington Park meet all of these tests. While not controlling under the issues as presented in this case we believe that standards such as these might serve as a useful guide for future administrative action.[121]

Although the court couched its dicta in terms of administrative action, it is clear that the sister-state citations to Wisconsin were meant as legislative guidelines as well.

b) The State of the Law

The Illinois Supreme Court in Paepcke was heavily reliant on the Sax analysis of the public trust doctrine ultimately opting for the "Wisconsin approach." In analyzing the public trust, Sax observed the necessity, under the Wisconsin approach, of clear guidelines and analysis so vital to a proper natural resources plan.

> If the Wisconsin approach is to be properly appraised, it is essential to understand the disadvantages under which courts have traditionally labored when dealing with cases such as those involving public trust lands. Those disadvantages arise because courts are accustomed to dealing with the meaning of statutory and constitutional language rather than with data which help to identify and compare the benefits and costs at stake in the cases before them. Therefore, the courts have had to fashion for themselves guidelines which will permit the court either to filter out cases in which there is a rather clear loss to the public interest or to thrust back upon administrative agencies or legislatures the responsibility to adduce persuasive evidence that the public interest is not being neglected. Sometimes courts will require that a record be made and data collected in order to satisfy the court directly that every important

> interest is adequately considered. A court may also . . . adopt an approach which requires that there be an open and explicit legislative decision, so that a proposal will be tested against the wishes of an informed public. Finally, a court may serve notice that the public benefits from certain kinds of projects are so inherently unclear that such projects should not be advanced unless it can be shown that they are in fact necessary or desirable from the perspective of the public interest.[122]

Let us now turn our attention to the protection being afforded lands of great state- or region-wide public value in one other state. As of July 1, 1974, Connecticut's state government began to protect critical land use areas under the Inland Wetlands and Water Courses Act. The same environmental problems confronting Illinois caused the Connecticut legislature to act with somewhat amazing dispatch.

c) Connecticut

"An Act Concerning Inland Wetlands and Water Courses,"[123] states its purpose to be the protection of the public interest, health, safety and welfare of Connecticut citizens through regulation of activities on "indispensible, irreplaceable and fragile"[124] natural resources--inland wetland and water courses. The public interest in and the environmental value of these areas is articulated throughout, and an orderly process created to balance protection of these valuable areas with land use and economic growth is specified in considerable detail. There are several particularly significant aspects of the act.

First is the regulatory nature of the act. It is not a prohibition on activities in inland wetlands and water courses. Rather, it sets up a process for wise use of these delicate areas. Right of use is not taken away--proper use is allowed, and made more likely by the process. No activities are prohibited; several are permitted outright--farming, farm ponds of three acres or less, boat moorings, uses incidental to enjoyment and maintenance of residential property, construction and operation by water companies of facilities necessary to impound and store water in connection with public water supplies, and homes or subdivision lots for which a building permit was issued or subdivision approved as of the effective date of promulgation of municipal wetlands regulations.

Also permitted, provided they do not disturb the natural and indigenous character of the land, are conservation measures, and outdoor recreation including play and sporting areas, golf, trails, hiking, nature study, horseback riding, swimming, skin diving, camping, boating, water skiing, trapping, hunting, fishing and shell fishing.

All other activities which remove material from, deposit it in, obstruct, construct, alter or pollute an inland wetland must be granted a permit before they are undertaken. Thus, the value of a particular inland wetland or water course and the results--or environmental impact--of a particular action are carefully examined before the activity is undertaken, and the public stake in the wetland and the role of the land in maintaining a stable ecosystem are carefully considered.

The act explicitly encourages municipalities to designate a local agency as the P.A. 155 decision-making body. If the municipality did not do so by June 30, 1974, the state DEP became the permit authority--but municipalities may choose to regulate locally any time after the deadline, and both the law and the state DEP heartily encourage local control. While on the face of it, this emphasis on municipal control appears to be a natural extension of local zoning powers and traditional home rule sentiment in the state, it also has a most significant result. For the first time, environmental impact criteria are required to be considered by a local decision-making body, should the municipality choose to have such. This brings, in one fell swoop, a land use program based on environmental concerns to the local level.

6. Conclusion

a) Implications for Illinois

That is the framework.

The areas of public trusteeship in Illinois are clearly areas falling within the protection not only of the doctrine but of Article XI of the Constitution and City of Chicago v. Pollution Control Board. Surely it includes our lakes, but what of our forests, our wetlands, our marshes? And what of our rivers and streams, hillsides and bluffs? What of our State and local parks? What of our prime agricultural lands? What of wildlife habitats and historic sites? We must take great care in identifying these areas of public trust--nothing would do greater harm to the doctrine or to the hoaried concepts of private ownership than to promiscuously identify a myriad of valued land uses as within the State's trusteeship.

What can we learn from the Illinois public trust doctrine? From the Connecticut Act? We know that certain physical and environmental assets in and of our State belong to all of our citizens--the Lake, for example, belongs not merely to the citizens of Chicago or Lake Forest, Highland Park or Waukegan, but to all of the citizens of Illinois and, perhaps, even beyond (as is exemplified by the Lake Michigan water diversion case). These State assets pay no attention to the artificiality of the boundaries of local government units, as the Mount Carmel opinion so vividly indicates and certainly not to the lot lines of an individual property owner. Thus, to continue to regulate, to control these assets on a community by community basis defies logic and reason and is, in fact, nigh impossible.

The public trust doctrine cries out for the setting of standards at, at least, a regional level or at the plateau of state government. Not to do so defies the spirit of Illinois Central and the mandate of Paepcke. We must prepare ourselves for an input at the regional or state level that will permit the proper use and allocation of those identified resources that are in the public trust. This is controversial--it flies in the face, to some extent, of the basic home rule concept so new to Illinois. Yet, State resources demand state treatment--local resources, local treatment.

The public trust doctrine, as outlined here, is obviously no panacea for the conservation, the preservation of our State's noticable and critical resources. It is, however, a viable doctrine, centuries old yet modern in application, that can form an independent basis for the exercise of the public power to preserve our land use and environmental heritage.

The concept of a local/state partnership in the management of the shore and coastal zone emergent is not a new one. It grows, however,

from concepts of public trust and home rule--from the legal obligations of the State and local government. Home rule in Illinois enables this partnership. Perhaps the Advisory Commission on Intergovernmental Relations has described this best:

> . . . limitations of local home rule arise from the close functional interrelationships that exist in metropolitan areas. Many problems have grown beyond city limits, but the city's power to cope with a situation ends abruptly at its boundary lines. In addition to local inability to provide many services, individual communities may damage their neighbors' interests by their own policies--by excluding moderate-cost housing or polluting rivers for example.
>
> The complexity of metropolitan problems and the inability of many smaller units to cope with them defeats the theory of local home rule and popular control, as well as the ability of local government to provide services. Where everybody is concerned but no one unit has the power to act, what purpose is served by local popular control? The Commission shares the view expressed by Luther Gulick that municipal home rule in the mid-20th century is not the right to be left alone behind legally defined bulwark, but rather the right to participate as an equal partner in arriving at decisions which affect community life.[125]

FOOTNOTES

1. WEXLER, THE LEGAL FRAMEWORK: LAKE MICHIGAN AND ITS SHORE III-54 et seq. (1975).

2. See, e.g., the visceral reaction to proposals of the Zoning Laws Study Commission in 1971.

3. For a detailed, if simplistic current view of home rule in Illinois, see, Froehlich, Home Rule, in ILLINOIS MUNICIPAL LAW, ch. 24 (1975) (hereinafter cited as "FROEHLICH").

4. SATO and VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 216, 217 (1970) (hereinafter "SATO") citing McBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 3-12 (1916).

5. J. Dillon, LAW OF MUNICIPAL CORPORATIONS, 237 (5th ed. 1911) first appearing in City of Clinton v. Cedar Rapids and Missouri River RR Co., 24 Iowa 455 (1868).

6. Id. at 448.

7. See, e.g., cases as recent as Connelly v. County of Clark, 16 Ill. App.3d 947, 307 N.E. 2d 128 (1974); to Ives v. City of Chicago, 30 Ill. 2d 582, 198 N.E. 2d 578 (1964); to City of Chicago v. Ingersoll Steel and Disk Div., 371 Ill. 183, 20 N.E. 2d 287 (1939).

8. Ariz. Const. Art. XIII, §§2 and 3; Calif. Const. Art. XI, §6 et seq.; Colo. Const. Art. XX §§1-6; La. Const. Art. XIV, §3(a) (as to East Baton Rouge Parish and the City of Baton Rouge only); Md. Const. Art. XI A (as to Baltimore only); Mich. Const. Art. VIII, §2 et seq.; Minn. Const. Art. IV, §36; Mo. Const. Art. VI, §§19 and 20; Neb. Const. Art. XI, §§2-5; Nev. Const. Art. VIII, §8; N.Y. Const. Art. IX, §§9, 11-13; Ohio Const. Art. SVIII; Okla. Const. Art. XVIII, §§2-7; Ore. Const. Art. XI, §§2 and 2-a; Pa. Const. Art. XV, §1, Tex. Const. Art. XI, §5; Utah Const. Art. XI, §5; Wash. Const. Art. XI, §§10 and 11; W. Va. Const. Art. VI, §39(a).

9. FORDHAM, LOCAL GOVERNMENT LAW 77 (1949).

10. Id.

11. ACIR, METROPOLITAN AMERICA: CHALLENGE TO FEDERALISM 123-124 (1966).

12. Ill., Sixth Const. Conv., Record of Proceedings, Committee Proposals--Member Proposals, Committee on Local Government Proposal 1 (1972), VII: 1605 (Emphasis omitted).

13. Shoeplein, "Home Rule and Local Government Finance" in Gove, HOME RULE IN ILLINOIS '73 (1973).

14. As noted in Froelich, supra., note 3 at 24-20: "To simply say that the concept of home rule reverses Dillon's Rule is to understate the dramatic change in state-local relations introduced by the 1970 constitution."

15. ILL. CONST. ART. VII, §6.

16. Green, "Home Rule, Preemption and the Illinois General Assembly," in Gove, HOME RULE IN ILLINOIS 49 (1973).

17. Sixth Constitutional Convention, Committee on Local Government, mono., Baum, "A Preemption Primer," (1970).

18. Ill. Const. Art. VII, §9.

19. VII Record of Proceedings, Sixth Illinois Constitutional Convention 1567 (1970) (hereinafter cited as "VII"); Baum, ed., Scope of Home Rule: The Views of the Con Con Local Government Committee, 59 Ill. B.J. 814 (1971).

20. Foss, "Illinois Home Rule: The Preemption Puzzle," mono., U. of I. Law School (1975).

21. Cole, "Illinois Home Rule in Historical Perspective," in Gove, HOME RULE IN ILLINOIS 19 (1973). In Massachusetts, for example, local units may not tax or incur debt. (Hereinafter cited as "Cole").

22. Id.

23. The preemption sections have been referred to by John C. Parkhurst, Chairman of the Local Government Committee as "the heart of the home rule concept in Illinois." Parkhurst, "Two Years Later: The Status of Home Rule in Illinois," in Gove, HOME RULE IN ILLINOIS 23 (1973).

24. Baum, A Tentative Survey of Illinois Home Rule, Part II: Powers and Limitations, 1973 U. I. LAW F. 157.

25. ILL. CONST. ART. VII §6(a).

26. VII, supra. note 19 at 1622. (Emphasis added).

27. Id. at 1621.

28. OHIO CONST. ART. XVIII, §3:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local, police, sanitary and other similar regulations, as are not in conflict with general laws.

This conclusion has vital impact on the Program. See discussion, infra., at n.

29. VII, supra. note 19 at 1623.

30. Forrest, "Improved Land Use Regulation for The Home Rule Municipality" in Gove, HOME RULE IN ILLINOIS 104 (1973).

31. Ill. Rev. Stat., ch. 120 §§675, 705 (1971).

32. 54 Ill. 2d 74, 295 N.E. 2d 9 (1973).

33. Id. at 78, 295 N.E. 2d 211.

34. Peters v. City of Springfield, 57 Ill. 2d 142, 311 N.E. 2d 107 (1974); Clarke v. Village of Arlington Heights, 57 Ill. 2d 50, 309 N.E. 2d 576 (1974); Rozner v. Korshak, 55 Ill. 2d 430, 303 N.E. 2d 389 (1973); People v. Beck, 54 Ill. 2d 561, 301 N.E. 2d 281 (1973); Kanellos v. County of Cook, 53 Ill. 2d 161, 290 N.E. 2d 240 (1972).

35. As an aside, it should be noted that the Illinois General Assembly, in an obvious reaction to the Bridgman decision, established a new expedited procedure for tax collection. Ill. Rev. Stat., ch. 120 §705 (1973).

36. VII, supra. note 19 at 1642.

37. Id. at 1643.

38. 59 Ill. 2d 484, 322 N.E. 2d 11 (1974).

39. Id. at 486.

40. Id. at 487.

41. Id.

42. Id. 2d at 489 (emphasis added). See, also, City of Des Plaines v. Chicago & N. Western Ry. Co., 30 Ill. App. 3d 944 at 948, 949 (1975); wherein a private owner/industry attempted to assert state exclusivity and was rejected on the basis of, inter alia, City of Chicago v. Pollution Control Board by the 4th Appellate District.

43. See, e.g., O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E. 2d 432 (1973), although therein there were no assertions of home rule powers; and Carlsen v. Village of Worth, 25 Ill. App. 3d 315, 322 N.E. 2d 852 (1975).

44. See, e.g., Kanellow v. County of Cook, 53 Ill. 2d 161, 290 N.E. 2d 240 (1972). See, also, Amerpsand, Inc. v. Finley, 61 Ill. 2d 537, 543 and 338 N.E. 2d 15, 19 (1975) wherein the court stated that:

"[T]he dominant interest which the State has in the administration of justice by virtue of Article VI of the Constitution 'precludes this subject from being considered a matter pertaining to home-rule government and affairs.'"

45. See, e.g., City of Chicago v. Pollution Control Bd., 59 Ill. 2d 484, 322 N.E. 2d (1974).

46. ANTIEAU, MUNICIPAL CORPORATION LAW §3.35 (1968) (referring to Philadelphia).

47. Kratovil and Ziegweid, Illinois Municipal Home Rule and Urban Land--A Test Run of the New Constitution, 22 DEP. L. REV. 399 (1972).

48. Forrest, supra. note 30 at 104.

49. 24 Ill. App. 3d 900 (4th Dist., (1974).

50. LaSalle National Bank v. Countv of Cook, 12 Ill. 2d 40, 145 N.E. 2d 65 (1958); Treadway v. City of Rockford 24 Ill. 2d 488, 182 N.E. 2d 219 (1962).

51. Johnny Bruce, 24 Ill. App. 3d at 904.

52. 53 Ill. 2d 347 (1972).

53. Ill. Rev. Stat., ch. 24 §§11-74-1--11-74-13, incl. (1971).

54. Salem, 53 Ill. 2d at 365.

55. Id. at 366 (citations omitted).

56. Id. at 365: "The acquisition of land by purchase or gift is not an exercise of a governmental power; it is an act of a proprietary nature."

57. 61 Ill. 2d 483 (1975).

58. Id. at 485.

59. Id.

60. A dissent was filed by Justice Goldenhersh but not on the home rule issue or finding.

61. Van Natta, 61 Ill. 2d at 486.

62. Ill. App. 3d N.E. 2d (2d Dist. 1975); now on petition for rehearing (Doc. No. 74-384, slip op.).

63. Ill. Rev. Stat., ch. 121 §5-408.

64. FROELICH, supra. note 3 at 24-12 and 24-81; Highland Park, slip op. at 14.

65. Highland Park, slip op. at 14-15.

66. Id. at 15.

67. See supra. note 28 and infra note 69 and accompanying test.

68. Highland Park, slip op. at 17. It should be noted that an entirely opposite conclusion as to a federal expressway was reached by the State's Attorney General, in A. G. OP. S-540 (August 1, 1975).

69. 59 Ill. 2d 484 (1975).

70. Ohio Const. Art. XVIII, §3 (1912).

71. Fitzgerald v. City of Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

72. Boukalik, et al., LAKE ERIE SHORE ZONE MANAGEMENT PROGRAM LEGAL AND ADMINISTRATIVE ANALYSIS 13 (1975).

73. Village of Beachwood v. Board of Elections of Cuyahoga County, 167 Ohio St. 369, 148 N.E. 2nd 921 (1958) (emphasis added).

74. City of Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E. 2d 226 (1941).

75. State ex rel. McElroy v. City of Akron, 173 Ohio St. 189, 181 N.E. 2d 26 (1962).

76. Calif. Const. Art. XI Sections 11, 12 and 13.

77. 5 Cal. 3d 480, 96 Cal. Reptr. 553, 487 P. 2d 1193 (1971).

78. 487 P. 2d at 1200 (emphasis added).

79. 487 P. 2d at 1201 (citations omitted).

80. 487 P. 2d at 1204.

81. Id. (citations omitted) (emphasis added). The California Supreme Court noted in a footnote another aside apropos Lake Michigan:

"We do not, of course, say that planning and zoning are in all instances matters of more than local concern; we merely hold that under the instant facts they are of regional significance."

82. WEXLER, THE LEGAL FRAMEWORK: LAKE MICHIGAN AND ITS SHORE, FIRST YEAR WORK PRODUCT, VOLUME I, LEGAL ANALYSIS (1975).

83. Sax, DEFENDING THE ENVIRONMENT 162 (1970).

84. Id.

85. Sax, THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCE LAW: EFFECTIVE JUDICIAL INTERVENTION, 68 Mich. L. Rev. 471, 474 (1970) (hereinafter cited as Sax).

86. 146 U.S. 387 (1892).

87. Id., at 433, 434.

88. Id. at 435.

89. Id. at 437.

90. Id. at 444.

91. Id. at 445, 446. It should be noted that the Court assumes that riparian rights in Illinois included the right to wharf out to the point of navigability. The assumption was incorrect and the question is to be decided under state law.

92. Id., the court did uphold that portion of the 1856 City Ordinance that allowed the Illinois Central to fill in certain lands in aid of access to the Randolph Street station. Id. at 448.

93. Id. at 452.

94. Id.

95. Id.

96. Id. at 453, 454.

97. Id. at 454.

98. Sax, supra. note 3 at 490.

99. Sax, supra. note 83 at 489.

100. 154 U. S. 225 (1894).

101. Id. at 239.

102. 176 U. S. 646 (1900).

103. Id. at 658.

104. Id. at 659.

105. Id. at 660.

106. Id. at 664. See also, Trustees of Schools v. Schroll, 120 Ill. 509 (1887).

107. 176 U. S. at 664.

108. Section 8 of the Charter provided that nothing in the act authorized the railroad to make a location of their trade within any city, without the consent of that city. The Court held that this proviso included depots, engine houses and track approaches, as well as the main track of the road. Id. at 665.

109. The opinion rates but a footnote in Sax, supra. note 85.

110. Sax, supra. note 85 at 490.

111. Sax supra. note 85 at 491, 492, " . . . the Massachusetts court has developed a rule that a change in the use of public lands is unpermissible without a clear showing of legislative approval." Cf., Gould v. Greylock Preservation Commission, 350 Mass. 410, 214 N.E. 2d 114 (1966).

112. 14 Ill. 2d 307 (1958).

113. Id. at 319.

114. 34 Ill. 2d 495 (1966).

115. S.B. 782 (Ill. G.A. 1963).

116. 34 Ill. 2d at 499.

117. Id. at 501.

118. 46 Ill. 2d 330 (1970).

119. Id. at 341.

120. See supra. note 85.

121. Id. at 343, 344.

122. Sax, supra. note 85 at 514.

123. Connecticutt P. A. 73-155 (1973).

124. Id.

125. ACIR, supra. note 11 at 124.

CHAPTER III
EXISTING TECHNIQUES OF MANAGEMENT

The shoreline communities on Lake Michigan in northeastern Illinois have already contemplated the use of a significant number of both traditional and innovative regulatory and non-regulatory techniques within their boundaries which are, therefore, applicable within the coastal areas. We find in place a plethora of management techniques that are certainly beyond the threshold contemplated by the management authorities and organizations suggested by the Program's state/local partnership.

Traditional techniques--e.g. the creation of Euclidian zoning districts with an amendment and variance process setting maximum densities within residential zoning areas--exist within each of the shoreline communities. The extent of these regulations and an analysis thereof appears in the work of the Northeastern Illinois Planning Commission for the Program and no further analysis was undertaken in the Second Year. Instead, we have analyzed the techniques that are available municipality-wide both to demonstrate the existing use of important management tools in the coastal community and, at one and the same time, to attempt to ascertain the "transferability" of techniques from one community's experience to another's. In addition to our research into the techniques in northeastern Illinois, the Illinois Coastal Zone Management Program has compiled certain ordinances and resolutions from other states and coastal areas that might be applicable in the Shore or Hazard Areas or Inland Areas as suggested as part of the partnership.

1. Planned Unit Development

Other than Wilmette, Winnetka and Kenilworth, all of the Lake Michigan shoreline municipalities have in place a planned unit development ordinance that encompasses the flexibility contemplated by the planned development technique. The goals of a residential planned unit development regulation have been variously stated but may be summarized as oriented to the following seven objectives:

1. Environmental design in the development of land that would be better than is possible through the strict application of zoning ordinance requirements on a district-by-district or lot-by-lot basis.

2. Diversification in the uses permitted and variation in the relationship of uses, buildings,

open spaces, density and bulk in developments that are conceived as cohesive and unified projects.

3. Provisions for the functional, aesthetic and beneficial use of open areas and open spaces.

4. The maximum preservation of natural site features.

5. Provision of a safe and desirable living environment for residential areas characterized by a unified construction and site development programs.

6. Rational and economic development in relation to public service.

7. Creation of a variety of housing types, with a compatible neighborhood arrangement, to provide a greater choice of types of environment and living units.

If the above objectives can be accepted, arguendo, then an analysis of the in place ordinances finds that these goals are being satisfied within many of the coastal communities where planned unit development ordinances are being implemented.

The Village of Glencoe, for example, uses the descriptive term "optional privilege" to describe the traditional planned unit development process. The extremely simple section describes the goals that Glencoe perceives need be accomplished within the scope of a PUD:

> The Zoning Commission in considering the granting of optional privilege may take into account the following environmental design objectives: Preservation of landscape by minimizing tree or soil removal and grade changes; relating of proposed buildings more harmoniously to terrain; reducing drives, parking and circulation and increasing pedestrian ways and bike ways; providing surface water drainage so as not to affect neighboring properties; installation of electric and telephone lines underground and location of aboveground installations harmoniously; and providing special features such as grouping accessory buildings or locating private swimming pools, tennis courts or other recreational uses common with

> housing developments. In exchange for the optional privilege of such development, there shall be no increase in aggregate density as otherwise permitted in this ordinance, there shall be provided a perimeter set back not less than the front yard set back in the district in which the development takes place, and there shall be permitted no building height to exceed forty feet as an absolute limit . . . .

Thus, Glencoe, ab initio, underscores the environmental concerns of the planned unit development technique--the concerns most evident within the proposed coastal zone boundaries. It is apparent that these environmental concerns so evident within the fragile coastline area were at the basis of the City of Chicago's enactment of its Lake Michigan and Chicago Lakefront Protection Ordinance--an analogue to the PUD process--as the Ordinance was enacted:

> To insure that construction in the Lake or modification of the existing shoreline shall not be permitted if such construction or modification would cause environmental or ecological damage to the Lake or would diminish water quality; and to insure that the life patterns of fish, migratory birds and other fauna are recognized and supported . . . .

Although Chicago has its own planned development ordinance, the Lakefront Protection Ordinance submits the coastal area to a planned development-like technique in overlaying the protection of the lakefront "controls" on existing lands within Chicago's defined coastal area and on the underlying zoning districts affected. The Lakefront Protection Ordinance, reproduced in full as Appendix A to this Report is the clearest example in place of municipal attention to a special process for land areas influenced by and themselves influencing the lake.

Perhaps no community's planned development regulations more clearly articulate environmental concerns than do those of the City of Lake Forest:

> ENVIRONMENTAL DESIGN STANDARDS. The following standards shall be utilized by the Plan Commission in reviewing all site and building plans. These standards are intended to provide a frame of reference for the applicant in the development of site and building plans as well as a method of review for the Commission. These standards shall not be regarded as inflexible requirements. They are not intended to discourage creativity, invention and innovation. The specification of one or more particular architectural styles is not included in these standards.
>
> (i) PRESERVATION OF LANDSCAPE. The landscape shall be preserved in its natural state, insofar as

practicable, by minimizing tree and soil removal, and any grade changes shall be in keeping with the general appearance of neighboring developed areas.

(2) RELATION OF PROPOSED BUILDING TO ENVIRONMENT. Proposed structures shall be related harmoniously to the terrain and to existing building in the vicinity that have a visual relationship to the proposed building. The achievement of such relationship may include the enclosure of space in conjunction with other existing buildings or other proposed buildings and the creation of focal points with respect to avenues of approach, terrain features or other buildings.

(3) DRIVES, PARKING AND CIRCULATION. With respect to vehicular and pedestrian circulation, including walkways, interior drives and parking, special attention shall be given to location and number of access points to the public streets, width of interior drives and access points, general interior circulation separation of pedestrian and vehicular traffic, and arrangement of parking areas that are safe and convenient and, insofar as practicable, do not detract from the design of proposed buildings and structures and the neighboring properties.

(4) SURFACE WATER TRAINAGE. Special attention shall be given to proper site surface drainage so that removal of surface waters will not adversely affect neighboring properties or the public storm drainage system. Storm water shall be removed from all roofs, canopies and paved areas and carried away in an underground drainage system or other approved method of surface water disposal. Surface water in all paved areas shall be collected at intervals so that it will not obstruct the flow of vehicular or pedestrian traffic, and will not create puddles in the paved areas.

(5) UTILITY SERVICE. Electric and telephone lines shall be underground. Any utility installations remaining above ground shall be located so as to have a harmonious relation to neighboring properties and the site. The proposed

method of sanitary sewage disposal from all buildings shall be indicated.

(6) ADVERTISING FEATURES. The size, location, design, color, texture, lighting and materials of all permanent signs and outdoor advertising structures or features shall not detract from the design of proposed buildings and structures and the surrounding properties.

(7) SPECIAL FEATURES. Exposed storage areas, exposed machinery installations, service areas, truck loading areas, utility buildings and structures, and similar accessory areas and structures shall be subject to such setbacks, screen plantings or other screening methods as shall reasonably be required to prevent their being incongruous with the existing or contemplated environment and the surrounding properties.

The environmental design standards and the elements of existing shoreline ordinances already enacted and currently being implemented are techniques of land use management suggested by the Program as a "performance standard" evaluation for any land use within the management area. Certainly the planned development concept is one that has broad applicability within the shoreline context and suggests a technique of importance that is already well-recognized as such by our shoreline municipalities.

2. Setback Regulations

The power to impose setback restrictions has been delegated to municipalities and counties by Illinois' basic zoning enabling legislation. All of the shoreline municipalities in northeastern Illinois employ this technique albeit in a roadway context. Thus, the typical setback regulation relates building location to the street or right-of-way line. Winnetka is typical:

> There shall be a set-back of not less than thirty (30) feet. On streets where a set-back of more than thirty (30) feet has hitherto been maintained by buildings existing on lots or tracts having a frontage of fifty percent (50%) or more of the total frontage on one side of that portion of any street (a) lying between two intersecting streets, or (b) lying between one intersecting street and the cen-

ter line extended of the nearest street connecting with but not intersecting such street, or (c) lying between the center lines extended of the nearest streets connecting with but not intersecting such street, buildings shall maintain a set-back of not less than the average set-back of the aforementioned existing buildings; provided, however, that for the purpose of computing the average set-back of said existing buildings, buildings having a set-back of less than thirty (30) feet shall be deemed to be set back thirty (30) feet; provided further, that the average set-back requirement shall not necessitate a set-back on any lot in excess of sixty (60) feet nor (although not reducing the thirty (30) foot requirement) in excess of fifteen (15) feet more than that maintained by an existing main building on an immediately adjoining lot.

As is Glencoe:

> Building Line Setback: The minimum horizontal distance between the building line and the street or right-of-way line in a district, lot, tract, or parcel of land.

Setback regulations are a potential tool for managing the vital coastal resources in Illinois--contemplated are regulations mandating the establishment of setbacks from bluffs, ravines and similar fragile areas. The City of Lake Forest's Zoning Ordinance creates special setback regulations that exemplify this technique:

> BUILDING SETBACK LINES---Irrespective of any less restrictive requirements contained elsewhere in this chapter, no permit shall be issued for the construction, relocation, enlargement, or extension of any building, or concrete or masonry wall within the following distances from certain highways or streets within the City.
>
> (A) Within seventy (70) feet of the established center line of the right-of-way of that portion of Waukegan Road (Illinois State Highway Route 43) that is located within the corporate limits of the City.
>
> (B) Within thirty (30) feet of the westerly line of the existing right-of-way of that portion of Skokie Highway extending from Buena Road northerly to Old Elm Road.

(C) Within fifty-three (53) feet of the established center line of the right-of-way of Everett Road, Telegraph Road, Conway Road, Old Elm Road, and Buena Road.

(D) Within twenty-four (24) feet and six (6) inches of the established center line of Bank Lane between the southerly line of Illinois Road and the northerly line of Vine Avenue.

(E) Within twenty-eight (28) feet and six (6) inches of the established center line of Forest Avenue between the southerly line of Westminster and the northerly line of Deerpath.

The concept of special setback areas is, thus, well-recognized in the coastal zone context and can be employed as an added performance standard-oriented set of criteria.

It is important to note that in a critical Illinois land use case involving a shoreline municipality and turning on the validity of setback regulations, the Illinois Appellate Court emphasized the relationship between setbacks and public planning. In Karasik v. City of Highland Park,[1] the court not only noted that "[S]et back restrictions are subject to rigorous application . . . ," but that:

> The apparent design of such regulations is to provide conformity of frontage in the spirit of harmonious city planning.[2]

Further, in Karasik, the court went on to " . . . reject plaintiff's argument that the city set back ordinance may not be given retroactive effect as to pre-existing buildings," holding that, "[A] valid exercise of the police power can be made to apply and does apply to existing buildings."[3]

Given the existing employment of the setback regulatory technique and its approbation by the courts in place in the northeastern Illinois context, the technique remains one of the highest viability for application in the coastal management area.

3. Special Uses

The special use or special permit or special exception technique is employed by the totality of shoreline communities pursuant to the statutory authority of Illinois' Zoning Enabling Act. As Robert M. Anderson of Syracuse University succinctly points out:

> Special permit procedures are a product of the need for flexibility in the administration of the zoning regulations, a need which was felt at a very early date. The provision for administrative variance provided relief in specific instances of practical difficulties and unnecessary hardship, but variance procedures were incapable of converting an essentially rigid system of Euclidian zoning into a flexible tool for the accommodation of unlike and sometimes incompatible uses of land. By the use of special permits, the broad division of uses in terms of residential, commercial and industrial and subdivisions of each, can be supplemented by requiring a use which falls conveniently within a class assigned to a particular district, but which has singular characteristics which may be incompatible with some uses of such class, to submit to administrative scrutiny, to meet certain standards, and to comply with conditions. In addition, uses which cannot be confined to specific districts . . . can be reviewed by a board of adjustment and required to meet standards and conditions which protect their neighbors, wherever they are located.[4]

An Illinois decision explained the purpose of the special use technique clearly. In Pioneer Trust & Savings Bank v. County of McHenry,[5] the court held:

> The function of the special uses classification is to provide for infrequent types of land use which are necessary and desirable, but which are potentially incompatable with the uses usually allowed . . . . It permits a use which otherwise might be entirely prohibited in certain zones where the adverse effect on surrounding land is not to (sic) great . . . .

In recognition of the need and validity of the flexible management tool of special use, all of the shoreline municipalities other than Winthrop Harbor and Glencoe have opted for its use in one form or another. Generally, the municipalities employing the technique are satisfied with a recital of a litany of uses and conditions that would be of no illustrative value if reproduced here. The City of Evanston, however, describes its special uses, at the onset generically:

> 1. Purposes
> This ordinance is based upon the division of the city into districts, within any one of which the use of land and buildings, and the bulk and

location of buildings or structures as related to the land are essentially uniform. It is recognized, however, that there are buildings and uses which, because of their unique characteristics cannot be properly classified in any particular district without consideration, in each case, of the impact of those buildings and uses upon neighboring property or consideration of the public need for the particular buildings or use at the proposed location. Such Special Uses fall into the following categories:

a. Buildings and uses entirely private in character but of such a nature that their construction and operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities,

b. Uses traditionally affected with a public interest or uses operated by a publicly regulated utility, and

c. Planned Developments.

A similar provision appears in the Kenilworth Village Zoning Ordinance emphasizing, once again, the importance of special treatment for "[U]ses private in character . . . of such a nature that the operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities." Critical to the special use technique in application is the performance standard approach underscored in the Kenilworth and like ordinances in the shoreline communities:

(d) Standards. No special use shall be recommended by the Board of Appeals or authorized by the Board of Trustees unless the special use:

(i) is deemed necessary for the public convenience at the location;

(ii) is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected; and

(iii) will not cause appreciable injury to the value of other property in the neighborhood in which it is located.

(e) Conditions. The Board of Appeals may recommend and the Board of Trustees may provide such condi-

> tions and restrictions upon the location and operation of a special use, including but not limited to provisions for off-street parking and loading, as may be deemed necessary to promote the general objectives of this ordinance and to prevent or minimize injury to the value of property in the neighborhood.

If one can accept as a minimal function of the special use method that of avoiding the detrimental impact of otherwise beneficial uses dependent upon the environment within which the use is to exist, then the applicability of the technique to the coastal zone resource is clear and germane. Certain uses of property within the Shore or Hazard Area ("SA") or the Inland Area ("IA") such as greenhouses, industry and residential may be allowed by local government permit subject only to conditions on use and location and prior municipal review for compatibility with the public resource and environment. The special or conditional use technique is adaptable and applicable in toto to the coastal zone program's goals and objectives.

4. Aesthetic Controls

The acceptance of aesthetic criteria as a lawful land use management regulatory technique has been an exceedingly slow and reluctant one at best. Early on in the development of Illinois' land use law, the Illinois Supreme Court seemingly etched in stone its position on aesthetics:

> It is generally recognized that aesthetic considerations, while not wholly without weight, do not of themselves afford sufficient basis for the invasion of property rights, and this for the more or less obvious reason that while public health, safety and morals, which make for public welfare, submit to reasonable definition and delimitation, the realm of the aesthetic varies with the wide variation of tastes and culture. So, while it has been held that all uses of property or courses of conduct which are injurious to the health, comfort, safety, morals and welfare of society may be prohibited under the sovereign power of the State, though the exercise of such power result in inconvenience or loss to individuals, that power must find basis in the doctrine of overruling necessity or bear substantial relation to the public good and may not be based alone on aesthetic considerations. [6]

A decade later, the Court observed, in Neef v. City of Springfield: "It is no objection, however, to a zoning ordinance that it tends to pro-

mote an aesthetic purpose, if its reasonableness may be sustained on other grounds . . . public health, safety, morals or general welfare."[8] It was not until mid-1974 that the Illinois courts--almost in a parallel course to their holdings that land use management technique validity is dependent on comprehensive planning input--recognized, in LaSalle Nat. Bank v. City of Evanston,[9] in a judicial dictum, the validity of aesthetic considerations standing alone. In the LaSalle case, the City of Evanston was attempting, through its planning and land use regulations " . . . to have a gradual tapering of building heights toward an open lakefront and park area which could be used for recreational purposes."[10] The court observed that:

> . . . prior decisions of this court, while recognizing aesthetic elements, have not deemed them to be controlling in zoning cases. The reason advanced for declining to afford aesthetic qualities significant import is that the subject does not lend itself to exact definition but varies as to personal taste. However, there would appear to be significant authority that aesthetic factors may, in some instances, be utilized as the sole basis to validate a zoning classification. We are of the opinion that in the present case aesthetic qualities are a properly cognizable feature and that the evidence presented is supportive of defendant's position that the R-5A use is not arbitrary or unreasonable and is in accord with the general public welfare.

Typically, Illinois' shoreline communities were in the vanguard of those municipalities with aesthetic regulations. The Cities of Lake Forest and Highland Park, for example, had in place architectural or appearance review committees or commissions to evaluate aesthetic impact in the environmental sense. Evanston, as is exemplified by the 1974 LaSalle case, had expressed its aesthetic criteria in direct application to Lake Michigan. More typically, the shore municipalities have incorporated aesthetic controls into their planned development ordinances, as a performance standard criterion to be applied. Thus, North Chicago's "PUD" controls embody the vague concept of "design standards," and Winthrop Harbor describes the necessity of "harmony." The City of Chicago, in its 1974 amendment to its Comprehensive Zoning Ordinance planned development section, spoke to the criterion as follows:

> Guidelines. In reviewing an application for planned development . . . the Commissioner of Development and Planning, the Chicago Plan Commission and the City Council shall give consideration to the following guidelines:
>
> * * *

(h) Order and Harmony in structural placement and design providing accessibility to natural light, circulating air, and urban vistas free of visual pollution.

In Lake Forest, aesthetic controls are within the context of special use:

> No special use shall be recommended by the Plan Commission for approval by the City Council unless the Commission shall find that: . . .
>
> * * *
>
> (4) The exterior architectural appearance and functional plan of any proposed structure will not be incompatible with either the exterior architectural appearance and functional plan of structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district so as to cause a substantial depreciation in the property values within the neighborhood.

It can be seen from the above that in place in Northeastern Illinois are a series of ordinances that reflect upon aesthetics as a criterion for implementation as a land use management technique.

5. Environmental Controls-- Flood Plains, Ravines & Special Regulatory Districts

As earlier discussed in this Technique Report, environmental site plan review is not a new concept either nationally or in the State of Illinois. The analysis of planned development regulations in place in our shoreline municipalities clearly indicates that some cities and villages--notably, Glencoe, Chicago and Lake Forest--have inputted environmental-oriented performance standards into their criteria planned development approval. Other communities express their environmental concerns through ordinances with direct and express applicability to specific areas of particular concern.

Thus, the City of Highland Park, whose shore and inland areas are bisected by a series of ravines, has turned its attention to this fragile environment with a flexible ravine control ordinance incorporating by reference its zoning controls:

Deposit of material in or upon ravines, bluffs and other steeply graded premises.

(A) No person shall cast, sweep, drop, place, dump, or otherwise deposit any earth, fill, borrow, litter, grass, leaves, lawn and garden clippings, or any solid waste of any description in or upon any ravine or bluff, nor upon any tract, lot or parcel of land having a gradient of more than 10%, except in conformity with the provisions of Section 170.015 of this code in connection with the construction of a building or structure; PROVIDED, HOWEVER, that the City Council, upon the recommendation of the Director of Public Works and the City Engineer, may vary the provisions of this section for the purposes of restoration and conservation, when it is determined to be in the best interest of the public health, safety and welfare.

* * *

Sec. 170.015 Lot Area

(A) Each lot, tract or parcel of land upon which a structure or improvement is proposed to be erected shall contain not less than 20 percent tableland. (Tableland is defined as land where the cross slope in any direction does not exceed 10 percent). If the lot contains less than 80 percent of its total area in tableland, these further regulations shall be complied with: (passed 5/8/72).

(1) All surplus excavated material from any construction on any part of a lot where the gradient is greater than 10 percent must be completely removed from that area of the lot, excepting only the amount necessary to backfill around construction, and then only to the amount required to restore the area to natural grade. Natural vegetation on any part of a lot which has a slope greater than 10 percent shall remain undisturbed except within an area not to exceed 20 feet around the proposed building or construction.

(2) Concurrent with an application for a building permit, the owner of any ravine or bluff space lot subject to these regulations shall submit to the plan commission a topographical survey with contour lines at one foot intervals. Such plat shall show the proposed location and dimensions of all proposed

buildings or construction. The location of said buildings shall be shown with reference to required building lines and lot lines.

(3) Upon recommendation of the plan commission of such plat and plan of construction, a building permit, subject to all requirements of the building code and zoning ordinance may be issued. Any change in the size and/or location of any improvement on the lot shall be subject to a re-examination by the plan commission, prior to the issuance of a building permit or an application for variation.

The Village of Winthrop Harbor, in recognition of the environmental imperatives of the Lake Michigan shore, has created an overlay "Lake Plain District" the regulations for which " . . . are in addition to the use, lot size and building bulk regulations and restrictions" of the underlying zoning districts:

Lake Plain Restrictions. No building or structure shall hereafter be erected or altered in the Lake Plain District unless the following portions of the lot are brought to a uniform grade of not less than 5 feet above the average high water level of Lake Michigan: (a) the portion of the lot or premises on which the said building or structure is located; (b) a yard on each side of such building or structure that is at least 25 feet in depth, measured from and at right angles to each wall of such principal building or structure; and (c) any other part of such lot or premises occupied by accessory buildings or structures, access roads, walkways, and off-street parking and loading areas. The average high water level of Lake Michigan shall be measured along the shore line of said lake that is abutting on the Village of Winthrop Harbor and shall be determined by reference to the statistics and data made available by the Corps of Engineers of the United States Army.

The Winthrop Harbor "Lake Plain District" exemplifies, pure and simple, the application of typical, although perhaps oversimplified, flood plain controls to the Lake Michigan shore. The employment of flood plain controls as a land use management technique is not new to Illinois' shoreline cities and villages. The Northeastern Illinois Planning Commission has, for over a decade, distributed a Model Flood Plain Control Ordinance, recently updated. A signal end of land use management in Illinois has historically been protection from flooding dating back to this state's initial zoning enabling legislation in 1921:

> To the end that adequate light, pure air, and safety from fire and other danger may be secured, that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, that the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted . . .[12]

This basic end, among others, was upheld in Illinois' threshold land use management decision, City of Aurora v. Burns,[13] and, by implication, if not directly, in every decision subsequent thereto. The City of Highland Park's flood plain controls originally enacted in 1973, exemplify this land use management technique as applied in a shoreline municipality:

> (A) The flood plain shall be subject to flood plain regulations as established by the City Council and set forth in (1) this chapter; (2) the subdivision ordinance or (3) other applicable city ordinances. (Said regulations will guide development in order to promote the public health, safety and welfare through flood regulations.)
>
> (B) Except as otherwise provided in this ordinance, no new existing building or structure shall be erected or moved within a flood plain unless the lowest floor including the basement floor is at an elevation which is not less than 2.5 feet above the flood base elevation for the site; provided, however, that the basement floors may be erected below such elevation if neither the top of any basement wall or the bottom of any opening therein is not less than 2.5 feet above such elevation and the construction of such basement floors and walls complies with the requirements of the "Highland Park Building Code of 1960", as amended. Basement walls and floors in all

structures must be designed to withstand hydrostatic pressures at flood base elevation water level and all sewers shall be "hanging sewers".

(C) The elevation of the ground for a minimum distance of 15 feet in the side and rear yards and 25 feet in the front yard immediately surrounding any building or structure erected or moved within a flood plain shall be at an elevation which is not less than one foot above the flood base elevation for the site and shall extend in width not less than 25 feet at or above said elevation to a public street or access way. This sub-paragraph does not apply to a building constructed on stilts.

(D) The elevation of the finished surface at the center line of any new street constructed within a flood plain shall not be less than the flood elevation for the area. The design of such streets or accessways shall be such that the normal direction or course of drainage or run-off through the area is not interrupted.

(E) If fill or any type of construction which would displace flood waters is placed within the flood plan, compensatory storage in the form of a compensatory storage basin shall be constructed equal in volume to 115 percent of the volume of such fill or construction deposited below the flood base elevation. The requirement of 15% additional compensatory storage over and above a strict 100% matching volume for water storage is designed to compensate for silting, delays in maintenance, and for the fact that building roofs permit no absorption by the ground. In determining and calculating the volume of compensatory storage basin, that portion of such compensatory storage basin which is below the median water level of the adjacent water course shall not be counted or considered as a part of the required volume of such compensatory storage basin. Median water level shall mean that level which is one (1) foot above the low water level of the watercourse or such other lower level as engineering datum may establish (as approved by the City Engineer).

(F) No building or structure shall be erected or moved within the area bounded on each side by a

ine parallel to and 125 feet distant from the center line of either the Skokie River or the North Branch of the Chicago River.

(G) Variances shall be permitted under this ordinance only if an owner of property shall establish by adequate factual data and hydrologic computations to show that:

(1) An error has been made in the establishment of flood base elevations; or

(2) Conditions have substantially changed or such that the flood base elevations have been lowered.[14]

Given the experiences of these municipalities in the development of special management tools and their existence in place, the development of a sufficient data and planning base would seem to be the sole impediments to the development and application of environmentally oriented land use mechanisms on the shore.

6. Non-Conforming Uses

The abatement of non-conforming uses has been a traditional land use management technique since the onset of the exercise of regulatory powers in this state. With a single exception (Zion), the shore municipalities have included within their management techniques, provision for the amortization of non-conforming uses consistent with Illinois law.

Generally, the Illinois courts have reflected on non-conformities within an enforcement context only when there has been an alleged abandonment or discontinuance of the use.[15] While the courts have sustained the governmental power to limit the expansion or alteration of non-conforming uses or structures,[16] few decisions have dealt with the issue of amortization without more. In Village of Gurnee v. Miller,[17] the court sustained a village ordinance setting a three year amortization period for the termination of a junk yard use after rezoning. In Village of Oak Park v. Gordon,[18] the Illinois Supreme Court, in an amortization context, set some rigid tests for sustaining such a municipal regulatory activity. In addition, the court in Gordon articulated the standard rules for adjudicating non-conformities as follows:

Plaintiff has called our attention to a number of cases in which amortization ordinances have been held valid. (Citations omitted). In each of those

> cases, there was an express finding that the public interest clearly justified the financial loss to the individual property owner who was required to terminate a particular non-conforming use. The record in this case, however, contains no evidence whatsoever that the public interest would be subserved in any way by requiring defendant to alter his property to accommodate two roomers instead of four. On the other hand, it is undisputed that defendant would suffer a financial loss if he were required to comply with the ordinance. The right to continue an established non-conforming uses has been recognized by this Court as a valuable property right, (citations omitted), and an ordinance which seeks to deprive defendant of that right without any apparent public need therefor, cannot be upheld.
>
> * * *
>
> We conclude that the municipal court of Oak Park correctly found that the Oak Park ordinance here in question was unconstitutional and invalid as applied to defendant's property. In so holding, we do not intend to express any opinion as to the validity of this or other amortization ordinances as applied to other properties. Each case must be judged upon the particular facts of that case with due consideration given to the respective interests of the public and the individual property owners.[19]

Thus, it is clear that a proper use of the amortization management technique--when supported by consistent public interest justifications--will be sustained.

The City of Evanston's zoning ordinance embraces the gamut of regulation of non-conforming uses of structures as well as uses of land:

> The purpose of this Section is to provide for the regulation of non-conforming buildings, structures, and uses and to specify those circumstances and conditions under which non-conforming buildings, structures, and uses which are incompatible with the character of the districts in which they are located shall be eliminated upon reaching the age of their normal useful life, in accordance with the authority granted by the Illinois Revised Statutes.

The 1963 City of Evanston ordinance restricts repairs, additions, moving and restoration of non-conforming buildings, uses and structures and for their elimination:

Elimination of Non-Conforming Uses
In Residence and University Districts any use lawfully existing on the effective date of this ordinance which is not permitted in any district or is permitted only in a Business, Commercial or Manufacturing District and which is located in a building all or substantially all of which is designed or intended for a use permitted in a Residence or University District shall be eliminated within five years from the effective date of this ordinance.
In R1, R2, R3 and R4 Districts any use of a single family detached dwelling or other dwelling unit, including any accessory building, by more than two roomers, boarders or permanent guests, or as a boarding house or nursing home or similar commercial use, shall be eliminated within eight years from the effective date of this ordinance unless allowed as a Special Use pursuant to Section VI B2.

In R1 and R2 districts any lodging room for roomers, boarders, servants or permanent guests located in a second dwelling unit on a lot shall be eliminated prior to December 2, 1968.

In any district, any lodging room for roomers, boarders, servants or permanent guests located in a building which does not conform to the floor area requirements of this ordinance or located on a lot which does not conform to the lot area requirements of this ordinance shall be eliminated prior to December 2, 1968. In any district, any lodging room for roomers, boarders, servants or permanent guests located in an accessory building shall be eliminated prior to December 2, 1968.

Of major import to the program is Evanston's techniques vis-a-vis non-conforming land uses:

NON-CONFORMING USE OF LAND
The non-conforming use of and not involving a building or a structure, or in connection with which any building or structure thereon is incidental or accessory to the principal use of the land, may be continued subject to the following provisions:

1. Expansion of Use

A non-conforming use of land shall not be expanded or extended beyond the area it occupies on the effective date of this ordinance.

2. Discontinuance of Use

If a non-conforming use of land is discontinued for a period of 120 days, it shall not thereafter be renewed, and any subsequent use of the land shall conform to the regulations of the district in which the land is located.

3. Change of Use

A non-conforming use of land shall not be changed to any other use except to a use permitted in the district in which the land is located.

4. Elimination of Non-Conforming Uses of Land

A non-conforming use of land shall be eliminated in accordance with the following requirements:

a. where no building or structure is employed in connection with such use, eliminated within 180 days;

b. where the only building, structure or other improvements employed have an assessed valuation before equalization of not more than $2,000, eliminated within one year;

c. where the only building, structure or other improvements employed have an assessed valuation before equalization of more than $2,000, eliminated within 3 years;

d. where a non-conforming use of land is accessory to a non-conforming use of a building or structure which is subject to elimination, it shall be eliminated on the same date on which the non-conforming use of the building or structure is eliminated.

The Village of Lake Bluff's ordinance provisions are far more simplistic and without amortization provisions:

> Any lot, or structure or any use of a lot or structure that existed and was lawful before the Lake Bluff Zoning Ordinance was originally adopted or

thereafter amended but which no longer fully conforms to regulations set forth in the Zoning Ordinance as amended shall be considered a non-conformity. The continuance of any such non-conformity is subject to the following provisions:

1. Any alteration, addition or repair to a non-conforming building or structure or any change made to a non-conforming property must in no way increase the existing non-conformity.

2. A non-conforming use may not be changed to a different non-conforming use.

3. Whenever a non-conforming use has for any reason been discontinued for a period of one month or more or has been changed to a conforming use, such non-conforming use shall not thereafter be resumed.

4. No building or structure that has been damaged by fire or other causes to the extent of fifty percent (50%) or more of its value, exclusive of the foundation, shall be repaired or rebuilt except in conformity with the regulations of this Ordinance.

Yet, regardless of the ordinances' sophistication, or lack of same, the tool of managing the non-conforming use of land or buildings is in place in the shoreline communities.

7. Performance Standards

A performance standard approach to land use management would not be novel to Illinois' coastal communities. This Report has noted that, without identifying them as such, many of the shoreline municipalities have used performance standard "tests" within the context of their planned development, special use and special district techniques. Traditionally, however, in Illinois, the application of performance standards has been articulated as no more than the application of traditional nuisance controls to regulate land use.

A bedrock legal foundation for land use regulation in the United States has been the maxim that an individual property owner should be allowed any use of his property that does not damage or cause injury to his neighbor or the public health, safety, morals, or welfare--a standard nuisance control approach.[20] The City of Chicago's first Zoning Ordinance,

in 1923, used a simplistic nuisance-oriented performance standard regulation of industrial use:

> M-1 Use--An M-1 use shall include such storage, manufacturing or other uses of property coming within the definition of an M-use as do not injuriously affect the occupants of adjacent uses and are so operated that they do not emit dust, gas, smoke, noise, fumes, odors, or vibrations of a disagreeable or annoying nature.

This very broad language was upheld by the court in City of Chicago v. Reuter Iron Works,[21] in clear "nuisance" language.

> A nuisance at common law is that which unlawfully annoys or does damage to another. Further, at common law, mere noise may be of such character as to constitute an actionable nuisance remediable by an action on the case for damages or by injunction. These principles are so much a part of the common law that further citation of authority is unnecessary on this point. It is to be noted that the zoning ordinance of 1923 provides for the fabrication of metals by means of practices which do not 'emit noises of a disagreeable or annoying nature.' An examination of the authorities discloses that the word 'annoyance' had a meaning in the common law in defining a nuisance. In Rosehill Cemetery Co. v. City of Chicago, 352 Ill. 11, this court used the word 'disagreeable' in defining a nuisance. It can be said, then, after a careful reading of the cases on this point, that the words 'disagreeable' and 'annoying' did have a well-established meaning at the common law in the definition of a common-law nuisance. We, therefore, hold the zoning ordinance of 1923 constitutional as setting forth a duty in terms which have acquired an established meaning through the common law.[22]

More modern applications of performance standards can readily be found in the sections of this Report previously cited and in the examples from other states. Thus, though the City of Chicago, for example, continues to define "performance standard" within a nuisance context:

> A 'performance standard' is a criterion established to control noise, odor, smoke, toxic or noxious matter, vibration, fire and explosive hazards, and glare or heat generated by or inherent in uses of land or buildings,

the examples from its Planned Development section and Lake Michigan Lakefront Protection Ordinance exemplify the ever-expanding scope and application of this technique in and along the Lake's shore.

8. Procedures and Process

Illinois' regulatory system enabling legislation, although archaic, sets forth the broad parameters for a legislative/administrative process protective of the constitutional rights of due process and equal protection of the laws. The shoreline municipalities, in toto, have various procedural mechanisms, in place, that, when applied, can satisfy these constitutional imperatives as well as the needs of land use management in the Lake Michigan shoreline context.

The procedures for land use management range from and among the following:

1. Permits and Certificates--building, development, occupancy, zoning, flood plain, ravine permits and certificates.

2. Land acquisition and eminent domain: the negotiated purchase or condemnation of lake frontage, riparian rights.

3. Amendments and Variances--building codes, zoning and subdivision ordinances.

The process involved in the shoreline municipalities ranges from an administrative order system[23] to an administrative appellate system, to a legislative amendments system.[24]

The Illinois courts have required strict adherence to the formalities of notice and hearing in an effort to assure fairness in the land use management process.[25] The present Illinois Zoning Enabling Acts dwell ambiguously upon the issue of delay in the procedural body reaching a final decision in land use management matters. Witnesses before the Zoning Laws Study Commission in 1970 and 1971 found that the time periods for reaching decisions vary from community to community.

Boards of appeal are only required to " . . . decide the appeal within a reasonable time."[26] The amendment process has no time limitation whatsoever. It should be noted, however, that counties wishing to avail themselves of land use powers may create a "commission" to hold hearings and report to the board "[W]ithin 30 days after the final adjournment of such hearings."[27]

Thus, existing Illinois law adopts the language of the ancient mode Standard Zoning Enabling Act ("SZEA") almost verbatim for purposes of hearing and decisional process.

As noted in the "Tentative Draft No. 1" of A Model Land Development Code:

> . . . One of the major, perhaps unfortunate, characteristics of the land development industry is that it is under-capitalized and relies on secured loans for land acquisition and construction.[28]

This is but one of the problems that delay in the decision-making process compounds. This problem, unlike that of notice, has been considered in the laboratories that are the states and has been met at least in one.

New York has adopted the SZEA language in toto much like Illinois.[29] Kentucky requires that "[I]t shall be the duty of the board to decide promptly, consistent with justice, all appeals or petitions."[30]

While the foregoing suggest little in the way of improvement, Massachusetts requires:

> If a city council fails to take final action thereon within ninety days after its hearing, it shall not act thereon until after it holds a subsequent hearing . . . [31]

Connecticutt goes one step further:

> . . . the commission shall adopt or deny the changes requested in such petition within sixty days after the hearing. The petitioner may consent to extension . . . .[32]

The Joint Committee of Illinois Bar Draft recommended to the General Assembly that:

> Within sixty (60) days after the conclusion of the last hearing on an application, the board shall meet and rule upon the application. Copies of the final decision of the board shall be furnished to the clerk of the municipality and he shall serve a copy of the decision on each party whose appearance is of record personally or by mail. The board shall make copies of its decision available to all other interested persons. If the board has failed to act on an application within sixty (60) days of the last hearing thereon, then the application shall be deemed to have

> been denied unless the applicant shall have consented to an extension of time for the board to rule upon the application.[33]

Sixty days, with the opportunity for an extension by the applicant, is certainly " . . . a reasonable time for a hearing body to reach a decision on all petitions." Such time restraints for the process do not appear in place in the shoreline land use ordinances.

Existing Illinois legislation has created a variable standard for notice of hearing on proposed changes in land use regulations depending upon the nature of the change sought; the municipal or county agency involved; and the nature of the forum granting the relief.

Thus, the State acts do not require, in municipalities, other than Chicago, or in counties, that written notice of an application for variation be given to property owners within a designated distance from the property which is the subject of the petition/application. As to hearings on amendments, the State acts affecting land use management generally require:

> . . . at least 15 days notice of the time and place of such hearings published in a newspaper of general circulation . . .[34]

The restriction as to municipalities requires the published notice " . . . not more than 30 nor less than 15 days before the hearing."[35] Published notice is the sole method provided, unless the municipality has a population of less than 500 in which event notice is by "posting in three prominent places."[36]

The notice requirements were far more stringent for Chicago than any other municipality in the state prior to home rule. For variations or "special uses" in Chicago, a minimum thirty days' written notice by personal delivery or registered mail of the intent to appeal must go to the record owners of all property " . . . within 250 feet in each direction of the location for which the variation or special use is requested." In computing the 250 feet limit, " . . . public roads, streets, alleys and other public ways . . ." are excluded. Not more than 30 nor less than 15 days before the hearing, the Board of Appeals itself must send notice to these same record owners. Although Chicago has incorporated these notice requirements in its ordinances and rules, its home rule powers could allow expansion or reduction thereof.

Municipalities and counties throughout the state have been advised in the interest of due process to give written notice to property owners within 250 feet of the subject site.[37] In addition, these recommendations to Illinois municipalities and counties urge that written notice

be undertaken in variation and amendment procedures throughout the state except in rural areas or in the development of larger tracts.

The contents of "notice," whether by publication, personal delivery or mail are stated in either a vague manner--" . . . said notice to contain the particular location for which the variation is requested as well as a brief statement of what the variation consists"--or without any identity of the nature of the proposed change--"[N]otice shall be given of the time and place of the hearing . . ." Certainly more is needed, and the "Joint Committee Draft" proposed a more complete Notice section:

> 4(B) Contents of Notice. Every notice prepared pursuant to this Section 11-13-11 shall contain the date, time, place and subject matter of the hearing. When an amendment is sought pursuant to Section 11-13-6, the subject matter of the notice shall include the identity of the person or body proposing the amendment, the legal and common description of the land, or the section numbers of the text, sought to be affected; and, a statement of the relief sought. When either a conditional use under Section 11-13-7, an exception under Section 11-13-9, or a variation under Section 11-13-10 is sought, the subject matter of the notice shall include the identity of the applicant therefor, the legal and common description of the land sought to be affected and a statement of the relief sought. When a proposed ordinance or an amendment to all or substantially all of an existing zoning ordinance is involved, the place where copies thereof will be accessible for examination shall be stated in the notice.[38]

Present Illinois statutes, other than in a recent reference to school district participation in zoning hearings, make no provision for possible reconciliation of the interjurisdictional conflicts that may arise out of the land use process. The Illinois courts have raised serious questions as to the ultimate "standing" of adjacent municipalities to bring suit or to appeal the zoning decisions of a sister city, village, township or county.

The problem of the notice requirement has been confronted by other states with generally the same legislative pattern as Illinois.

Thus, in Connecticut and Kentucky, states wherein published notice is generally the only requisite, a standardized notice procedure is applicable to all zoning changes, whether by amendment or variation.[39]

Massachusetts, like Illinois, provides only for publication for hearings on amendments, but further provides for publication, and mailing

" . . . to the owners of all property deemed by the board to be affected thereby . . ."[40] New York, with a plethora of differing requirements, ranges from "due notice thereof . . ." without explanation to explicit 10 day written notice.[41]

The growing trend among the states studied has been to recognize that certain land use decisions have an impact far beyond the artificial borders of the given municipality engaged in modifying its land use control procedures. In the past decade, other states have brought neighboring municipalities, regional and/or state agencies into the local land use process through "notice" procedures at the least.

The rule of thumb for notice to an adjacent municipality in New York is a required notice for zoning change within 500 feet of the boundary.[42] New Jersey reduces this to a 200 feet unit.[43]

While New York has a general municipal law subjecting certain municipal zoning and planning actions to county review much as the Inter-Agency Referral Act[44] requires review by the planning Commission in Chicago, New Jersey has gone so far as to establish, by separate legislation under the land use imprimatur, notice to adjoining municipalities, the state and counties as follows:

> Whenever a hearing is required in respect to planning, zoning, approval of subdivision, granting of variances or establishing or amending an official map involving property situated within 200 feet of an adjoining municipality and notice of said hearing if required to be given, the person giving such notice shall also, at least 10 days prior to the hearing give notice in writing of such hearing by registered or certified mail to the clerk of such municipality. The said notice shall contain a brief description of the property involved, its location and a concise statement of the matters to be heard.
>
> Article 5. Notices to Adjoining Municipalities
> 40:55-53. Planning, zoning, etc.; notice of hearing.
>
> Whenever a hearing or the governing body of a municipality in respect to the granting of a variance or establishing or amending an official municipal map involving property adjoining a county road or within 200 feet of an adjoining municipality, and notice of said hearing is required to be given, the person giving such notice shall also, at least 10 days prior to the hearing, give notice thereof in

writing by certified mail to the county planning board. The notice shall contain a brief description of the property involved, its location, a concise statement of the matters to be heard and the date, time and place of such hearing.

Article 5A. Notice to State and County 40:55-53.1. Planning approval of subdivision and official maps; notice of hearing.

Whenever a hearing of subdivisions or establishing or amending an official map involving property abutting upon or adjacent to a State highway or county road and notice of said hearing is required to be given, the person giving such notice shall also, at least 10 days prior to the hearing give notice in writing of such hearing by registered or certified mail to the Commissioner of Transportation, in the case of a State highway and to the county planning board, in the case of a county road. The said notice of hearing shall contain a brief description of the property involved, its location and a concise statement of the matters to be heard.[45]

In Connecticut, thirty days' written notice to the appropriate regional planning agency is required where applicable.[46]

These processes and procedural techniques merit consideration in any local revamp of its administrative process for coastal zone implementation.

CHAPTER IV
TECHNIQUES OF MANAGEMENT--A PROCESS OF INNOVATION

1. New Techniques

While the shoreline communities on Lake Michigan currently utilize certain management techniques to regulate the use of land in their communities, the broad and comprehensive objectives contemplated under the Illinois Coastal Zone Management Program may be difficult to obtain if only the more traditional methods of land use management are employed. We have seen that, in place, the shoreline municipalities have already begun the process of innovation so critical to the Program. The use of the planned unit development technique by most of the shoreline communities is an excellent step toward achieving the dual objectives of securing open space and maintaining strict control over the development that does occur in the Shore or Hazard Areas or Inland Areas. Planned unit development is especially effective because, unlike more traditional regulatory techniques, it affords both the community and the property owner certain flexibility in guiding the development of the land.

Certain other management techniques, while not in use as yet in shoreline communities in Illinois, have been suggested by various commentators and are employed in other jurisdictions. These techniques may become important management tools in the coastal zone because, like the planned unit development concept, they depart from Euclidian zoning and offer new tools to deal with those issues, such as the environment, which have recently become important factors in land use management. Some of the contemplated management tools may be implemented under the municipality's existing police powers while others may necessitate enabling legislation from the General Assembly or independent legislative action by home rule units. Prior to reviewing the new management techniques it is important to note that, like other new police power measures, they may be subject to judicial attack on due process grounds if not undertaken reasonably with proper attention to traditional concepts of fairness.

Regulations allegedly promulgated as an exercise of a municipality's police power to protect the public health, safety and welfare are often challenged on the ground that the regulation in fact constitutes a taking of private property which is violative of the due process clause of the 14th Amendment of the United States Constitution and the Constitution of the State of Illinois, Article 1, Section 2. As Justice Holmes suggested in the landmark case of Pennsylvania Coal v. Mahon,[47] no definitive line may be drawn to distinguish between a proper exercise of the police power and an unconstitutional taking:

> One fact for consideration in determining such limits [of the police power] is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts.
>
> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[48]

Certain of the management techniques to be reviewed may be especially vulnerable to attack on the "taking" ground as they restrict development of private property to a larger extent than more traditional regulatory measures. The success of these challenges in other jurisdictions and the probability of successful challenges in Illinois will be discussed in relation to each particular technique.

2. Timing of Development Controls

The broad category, "Timing of Development Controls" contemplates a number of different techniques that impose time controls on land use. For example, Ramapo, New York, utilizes phased regulation of both the tempo and sequence of private development in conjunction with a local government's plan for the extension and improvement of public services. Timing controls can also be achieved by specifically limiting the number of building permits that will be issued annually as was done in Petaluma, California, and approved by the federal courts. Such regulations may include sequence controls as well.

Such phased growth techniques were first formulated in an attempt to retard haphazard growth of communities. As was noted by the Douglas Commission:

> At the metropolitan scale, the present techniques of development guidance have not effectively controlled the timing and location of development. Under traditional zoning, jurisdictions are theoretically called upon to determine in advance the sites needed for various types of development . . . In doing so, however, they have continued to rely on techniques which were never designed as timing devices and which do not function well in controlling timing. The attempt to use large-lot zoning, for example, to control timing has all too often resulted in scattered development on large lots, prematurely establishing

> the character of much later development the very effect sought to be avoided. New types of controls are needed if the basic metropolitan scale problems are to be solved.

One of the most effective methods to insure orderly community development appears to be the adoption of managed growth programs by municipalities.[49]

As Robert Freilich, a well known proponent of phased growth controls, noted:

> The nexus between planning and incorporation of planning into legal implementing measures lies in the use of little known legal tools--interim development controls. Stated simply these controls can be used to prevent land development, during the formulation of planning policies, which would conflict in any way with permanent legal controls implementing the basic planning policies. With planning so protected, there is no longer the need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses and structures. Of even far greater importance are the corollary effects of such protection. Firstly, the planning process can be brought out into the open for full democratic debate and citizen participation; thus, assuring a greater relationship to the real goals and needs of the people. Secondly, continuous amendment and revision of the planning policies of the community can be, for the first time, successfully accomplished . . . With the use of interim development controls a flexible system of planning, continuously updated and current, can be utilized to provide the tying rod for an effective and complete system of total environmental protection.[50]

A timed development control program should be distinguished from the earlier, more common "interim" ordinances. This type of ordinance was not a true interim control designed to protect the planning process until the adoption of permanent controls, but was rather a "quickly prepared ordinance, without a map, designed to preserve the status quo until complete regulations could be established."[51] In contrast, a true interim control is designed to protect and enhance the planning process and may be utilized as an extremely temporary measure, during which a new land use plan may be created--for the coastal management area, for example. Such a plan may call for permanent rezoning or a time control plan to be carried out over a number of years. The interim development

control technique is an excellent threshold for either of these goals as it temporarily stops development which would otherwise interfere with the ultimate regulatory techniques to be enacted. The application of the technique in Illinois must follow the procedures set forth in the Illinois Zoning Enabling Act.[52]

The popularity of a timed development control ordinance is significantly increasing. Some commentators believe that timing and sequential controls' two major aspects--their ability to direct the rate of urban development, and encouragement of development only in areas with in place essential services--are the most effective means to control the shape and destiny of community development. Time controls emphasize controlling both population and community growth until the municipality is able to provide adequate services and facilities while growth is encouraged adjacent to built up areas before more remote areas are opened for development in order to assure efficient land use. In contrast to present planning techniques, which are rarely implemented, by incorporating planning into legal implementation measures they have a greater relationship to the needs of the community and its citizens.[53] It is contended that the use of interim development controls assure a greater relationship of land use to the needs of the people, as they allow a community to revise its planning policies as is warranted by changing conditions. Proponents of growth control techniques contend that their desirability lies in their ability to maximize growth in the community by establishing a method to ensure that essential services and facilities which an increase in population demands are provided.

Hand in hand with such a program is the design of a meaningful land development policy to encompass many regulatory areas other than zoning, since the planning of the environment is concerned with the totality of physical, social and economic policies and envisions a continuing planning process.[54] For example, the town of Ramapo, New York, instituted a managed growth program in 1969 after experiencing a growth rate of 78.5% over the prior six years. The town adopted a master plan that enunciated the town's key development policies: to provide for a moderate population increase and sufficient public facilities to meet the anticipated needs of their projected population increase. Using the master plan and budget process as the basic framework, the town created a timing device to effectively halt development for eighteen years. Development is permitted only if the proposed development area possesses a sufficient infrastructure, constructed publicly, or by private funding.[55]

The authority for instituting the "Ramapo Plan" was derived from New York State's enabling legislation which contains the standard language regarding the permissible purposes of land use regulation.[56] Although not verbatim, the Illinois zoning enabling act is substantially similar to the design of the Standard Zoning Enabling Act.[57] The purposes of phased regulation seem within the limits set by the New York

enabling act language, since controlling the tempo and sequence of growth can be justified by the issue to "facilitate provision of adequate public facilities of all kinds."[58] The Illinois enabling statute varies from the Standard language regarding public facilities, as it states "that the corporate authorities shall exercise their powers in part to facilitate the preservation of sites, areas, and structures of historical, architectural and aesthetic importance," yet this provision appears to be broad enough to condone the implementation of timing of developing controls in the coastal zone as preservation of the area has both historical and aesthetic importance.[59] Sufficient statutory authority specifying the purposes for which the police power may be employed does not end the question. The methods designed to achieve the purpose must also be authorized by the state subject to the now inherent home rule authority of eligible units.[60] This state enabling legislation requirement does not appear to apply to home rule units in Illinois, as the Illinois Constitution, Article VII, Sec. 6 states that:

> Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare . . .[61]

The Zoning Enabling Statute,[62] now expressly provides that it is inapplicable to municipalities that are home rule units. Thus, home rule units' power to zone for the public health, safety, morals, and welfare derive from the Illinois constitution.[63] Since timing of development control ordinances are so inextricably tied to zoning legislation, it appears that as to home rule units, no further state enabling legislation will be necessary.

As to non-home rule units, Illinois Revised Statutes, Chapter 24, Section 11-13-1 sets out various methods a municipality may employ under its zoning power. As the Golden court noted, "The power to restrict and regulate conferred under Section 261 [the New York zoning enabling statute] includes within its grant, by way of necessary implication, the authority to direct the growth of population . . . ."[64] In Illinois, the use of the special permit device has been upheld[65] and this device is the basis of Ramapo's phased zoning ordinance. Furthermore, the Illinois court has consistently held that a municipality may reasonably restrict increase of population density as necessary for its health, safety and welfare albeit by using traditional zoning measures.[66] The Illinois courts have also recognized the propriety of zoning with a view to orderly future development and have condoned the zoning of land for a heavier use than is presently needed,[67] or a more restrictive use.[68]

Although the enabling statutes may be held to be sufficiently broad to allow the imposition of timed development controls, regardless of

whether timing controls are enacted under the authority conferred by state enabling legislation or the constitution as to home rule units, a court must still consider the constitutional issues that bear on the validity of the purpose and means of an ordinance. Basically, the power to zone is broad and a zoning ordinance will be declared unconstitutional only if its provisions must be found to have, "no substantial relation to the public health, safety, morals, or general welfare."[69] Clearly, this limitation results in a broad and flexible grant of power.[70] Timed controlled regulation appears to be consistent with traditionally permissible goals as the problems caused by unregulated and overly rapid development are identical to those originally sought to be cured by the initial enactment of zoning regulations. Management techniques that attempt to rationalize the development process to avoid unnecessary destruction of natural amenities seems well within the power of a local government to advance the general welfare of the community.[71]

Even if the purpose for which timed development controls are found to be constitutionally valid, constitutional limitations on regulatory means still exist. In general, the constitutional guarantees of equal protection and due process impose limits on the zoning power in order to protect the interests of individuals who are affected by a regulation. The equal protection clause of the 14th amendment of the United States Constitution and Article 1 Section 2 of the Illinois Constitution require that zoning restrictions not unfairly discriminate against parcels of land that are "similarly situated."[72] While courts require that the law treat people differently only if there is a rational basis for so doing, considerable weight is given to legislative judgment in determining the rationality of a statutory distinction.[73]

Timed development zoning has primarily two aspects which raise equal protection issues. First, the operative effect of a phased-growth regulation is to treat in dissimilar fashion property which has the same underlying use designation. In Ramapo, for example, all the land affected by the ordinance was zoned for residential use. Although the growth control ordinance did not change this designation, it imposed temporal use restrictions of up to eighteen years. Arguably, contiguous parcels of land may be treated differently because phased growth controls make time, as well as space, a consideration; suitability for residential use thus becomes a function not only of the location of the land but also of the timing of development. Under the Ramapo approach, timing is determined by the availability of adequate facilities. Since this criterion justifies the restriction of development in the first place, it should also be sufficient reason for treating land which is inadequately serviced differently from land which is adequately serviced.

The second characteristic of phased zoning that raises an equal protection issue concerns the amount of discretion the special permit device may give the local government. A permit device unaccompanied by well-defined objective standards by which local administrators are guided

raises concern for the possibility of unequal administration. However, this concern may be overcome by conditioning permits solely on objective criteria.[74] Although this approach may prove to be too inflexible to serve all the stated purposes of a phased growth ordinance, it avoids the problem of vesting excessive discretion in an administrative body.[75]

Another traditional limitation on a local government's exercise of regulatory powers is the protection afforded private property rights by the due process clauses of state and federal constitutions.[76] The due process clause is construed in Illinois to require a rational relationship between the regulation as applied and the objective posited. The Illinois courts generally attempt to assess a land use management regulatory ordinance's degree of reasonableness by balancing the costs and benefits of the restriction.[77] Conformity to a comprehensive plan is now local government's chief defense against claims of a regulatory ordinance's arbitrariness.[78] If a phased ordinance is adopted in the context of an overall planning scheme, as was Ramapo's ordinance, a court may be further assured that the local government's efforts are reasonable and are rationally related to their conceived purpose.

Timed development control ordinances may also be subject to attack on the ground that they are simply another guise of exclusionary zoning. At best, such ordinances retard the influx of persons into a community as development must await implementation of a public capital improvement program.[79] At worst, it is a sophisticated method to insulate a community from the problems inherent in natural growth, including the entrance of lower income groups.[80] However, timing and sequential controls are basically interim devices and if coupled at the outset with a plan which provides for varied housing, a more heterogenous community may ultimately be achieved.[81] Even the Pennsylvania Supreme Court, which traditionally has taken a strong stance against exclusionary zoning pronounced in dicta:

> This is not to say that the village may not, pursuant to its other and general police powers, impose other restrictions on conditions on the granting of a building permit to the plaintiff, such as . . . granting of permits . . . in stages, or perhaps even a moratorium on the issuance of any building permits, reasonably limited as to time . . . .[82]

Thus, the court apparently condoned growth control devices which were bona fide attempts to prepare a community to deal with the problems of population growth. This is not to say that the New York or Pennsylvania courts prefer development control measures, rather, they may be permissible so long as they attempt to deal with the problems of an expanding population.

The final due process limitation on a local government's power to impose uncompensated restrictions on land use derives from the fifth amendment of the United State's Constitution,[83] which prohibits the taking of "private property . . . for public use, without just compensation."[84] Although "taking" is not susceptible of easy definition, it may be stated broadly as, " . . . constitutional law's expression for any part of publicly inflicted injury for which the Constitution requires payment of compensation."[85] Its central inquiry with regard to zoning is whether the regulation is a valid exercise of the police power or whether the power of eminent domain must be used to accomplish the objective. The line between the police power and the power of eminent is extremely difficult to locate. Thus, courts tend to draw the line "in response to an infinite number of factors within the factual context of each case."[86]

A local government employing any phased form of management regulation would probably be able to avoid the confiscatory attack at the outset by leaving some reasonable uses indiginous to the specific property available to the landowner. There is no inherent requirement that timing controls be totally restrictive.[87] For example, in addition to being able to build a single residential dwelling other uses are immediately available to a landowner in Ramapo whose land is otherwise subject to the timing controls.[88]

Thus, it appears that proper planning and drafting of a development control ordinance may obviate the possible constitutional objections to its enactment at the outset.[89]

The use of timed development controls should not be viewed as a panacea for the development problems within the coastal management area. The objective of such ordinances is to coordinate the tempo and sequence of development with the construction of necessary municipal facilities. Such a technique, if used arbitrarily or unreasonably, could, in fact, tend to be employed to exclude uses of the regional benefit and, thereby, per se violate intent and a key purpose of the Coastal Zone Management Act of 1972 itself. The mere failure to construct these facilities to service the coastal management area will not be a sufficient reason to continue to forestall development within the coastal zone once the period for the timed development control ordinance elapses. Therefore, other means, such as the creation of a special zone which places limitations on the permissible construction based on a performance standard approach within the coastal zone must necessarily be enacted in conjunction with any timed control ordinance.

3. Judicial Response to Timed Development Controls

Although the Illinois courts have not been confronted with the issue of the validity of timed development control, they have had occasion to

review interim ordinances under other circumstances. In Phillips Petroleum Co. v. City of Park Ridge,[90] the court defined an interim ordinance as "one passed with the intention of preserving the status quo until a subsequent zoning ordinance can be enacted."[91] While the court held that a city council cannot by resolution suspend the operation of a zoning ordinance then in effect, in dicta the court continued, stating that a suspension by ordinance would still be ineffective as there is no zoning enabling legislation authorizing the suspension of effective zoning ordinances. This rule was also enunciated in Westerherde v. Obernueferman,[92] however, the court stated that an exception to the rule is found when proposals for change, alteration or modification are pending prior to the time a property owner applies for a building permit and the property owner has notice, actual or implied, of the pendency of such action.

This exception to the so-called "vested rights" rule was somewhat limited, in American National Bank and Trust Co. v. City of Chicago,[93] wherein the court held that for the exception to apply the municipality must demonstrate that the property owner has actual knowledge of the proposed ordinance. Thus, it appears that while a municipality cannot suspend the operation of its zoning laws, it may withhold action on the application of building permits after notice is given to property owners of the proposed zoning change. This creates significant time pressures on municipalities, as zoning cannot be suspended until such time as a concrete plan is prepared for presentation at a public hearing. However, as the courts did not raise constitutional objections to interim zoning, legislation authorizing such measures passed by the General Assembly could alleviate the restriction. Furthermore, home rule units are not bound by this specific limitation as the state zoning enabling legislation is inapplicable to these units.

If it is ultimately determined that suspension of zoning regulations cannot be effectuated in Illinois, the door is still open to enactment of timed development controls, provided the traditional mechanism for enacting zoning amendments is followed.[94] Illinois courts have yet to rule on the validity of timed development controls; however, the enabling legislation which authorizes municipalities to regulate and limit the intensity of the use of lot areas, and to fix standards to which buildings or structures shall conform may be deemed sufficient to validate the use of such controls. A review of other jurisdiction's decision on this question may indicate the course the Illinois courts will follow.

The seminal case upholding the use of timed development controls is Golden v. Planning Board,[95] in which the Court of Appeals of New York upheld the "Ramapo Plan"[96] The court held that the ordinance was a legitimate exercise of the zoning power for the purposes of avoiding undue concentrations of population and facilitating adequate provision for transportation, water, sewage, schools, parks and other municipal facilities. The court further found that sequential development and timed growth were not exclusionary per se, but were attempts to provide a balanced and cohe-

sive community dedicated to the efficient utilization of land--an ideal of the land use management process. The restrictions conformed to the community's considered land use policies as expressed in its comprehensive plan and represented a bona fide effort to maximize population density consistent with orderly growth.[97] Nor did the court find that the ordinance constituted an impermissible taking as the restrictions were only temporary (if eighteen years as a maximum can be so considered) in nature.[98]

In Construction Industrial Association of Sonoma County v. City of Petaluma,[99] the District Court for the Northern District of California took a different view of the timed control program developed by the City of Petaluma. In 1971, the city enacted an official growth policy--the "Petaluma Plan"--in order to limit the city's demographic and market growth rate in housing and in the migration of new residents. As part of the "plan," the city created an "urban extension line" marking the outer limits of the city's expansion for at least twenty years, set an annual five hundred unit building limitation and limited its available public facilities.[100] By creating an "urban extension line" the city in effect reduced its projected population in 1985 from an estimated 77,000 to 55,000.[101]

In contrast to the "Ramapo Plan," the "Petaluma Plan" fixed an absolute limit on the number of units to be built annually, had no overriding standard other than the mere passage of time and had no fixed deadline after which development timing devices were prohibited. Local builders challenged the plan and the district court found that the express purpose and intended and actual effects of the express purpose and intended and actual effects of the "Petaluma Plan" were to "exclude substantial numbers of people who would otherwise have elected to immigrate into the city," which violated the right to travel. The court cited the Supreme Court's decision in Memorial Hospital v. Maricopa County:[102]

> a classification which 'operates to penalize those persons . . . who have exercised their constitutional right of interstate immigration' must be justified by a compelling state interest.[103]

The court then noted that:

> Inasmuch as there is no meaningful distinction between a law which 'penalizes' the exercise of a right and one which denies it altogether, it is clear that the growth limitation under attack may be defended only insofar as it furthers a compelling state interest.[104]

Finding that no compelling state interest (the constitutional standard) was served by the plan, the court held that the ordinance was unconstitu-

tional. On appeal, the Tenth Circuit reversed, finding that plaintiffs did not have standing to raise the right to travel question as their freedom to travel was not being impaired and that the "Petaluma Plan" was otherwise a constitutionally sound and proper exercise of the municipality's police power.[105]

Conclusion

It appears that timed development control ordinances may be an effective means to protect both the coastal zone and the entire municipality from unstructured and unplanned development. Of course, these controls may also be implemented only within the coastal zone as opposed to the municipality as a whole. Special treatment of the shore management area may be judicially sanctioned under Article II of the Illinois Constitution which specifically mandates that it is the public policy of the State to provide and maintain a healthful environment for the benefit of this and future generations in Illinois. Although not an end in itself, such management ordinances will, if properly implemented, help to bring the planning element into the position it deserves in the municipal land management process in the coastal area. In addition, timing controls can be an effective local management tool to assume that, e.g., erosion management structures are in place prior to development activity within the coastal zone.

CHAPTER V
GOVERNMENTAL INTERESTS IN LAND:
EASEMENTS AND BUILDING RESTRICTIONS

One of the major points made in the First Year Work Product[106] was that the confluence of the police power and the public trust, aided by a careful and considered planning process might provide the basis for a broader and more expansive view of both the public trust and the police power itself, than perhaps could be said to be the current view of the Illinois courts.[107] But nothing is without limit. We also noted that for a variety of reasons the administration of the Illinois Coastal Zone Program could involve a plan to acquire interests in real property, rather than a complete reliance on the police power, as one means of accomplishing the objectives of the Program.[108]

We shall now focus on the nature and character of interests in property that could be acquired as a part of the Program. This subject could be treated in a general way, and undertake a review of the entirety of the law of real property with its myriad of complexities and ambiguities.[109] Instead, the problem will be approached from a functional perspective. Acquisition of interests in real property for its own sake is not, so it seems, an objective of the Program. Rather, the implementation of the Program, the control of the use and development of land lying within the Illinois Coastal Zone, is the objective. The relevant issue, therefore, is one of control through such acquisitions in aid of or complementary to a comprehensive system of police power regulations.

It is obvious that if all of the land lying within the Coastal Zone were in public ownership, then the question of control would simply involve the making of appropriate arrangements and adjustments by and between the various public authorities having an interest in the Illinois Shore. Such is not now the case and the probable cost of obtaining such a result would be enormous. Even if it were feasible for public agencies to acquire title to all lands lying within the Coastal Zone, the desirability of doing so would be subject to considerable debate. As a general matter, therefore, our emphasis is on interests in land that do not disturb private ownership.[110] Such interests are usually called less-than-fee interests.[111] Of particular concern, however, is essentially with that class of interests known as easements or interests in the nature of easements. The concept of conservation and preservation easements has become an increasingly popular tool of local governments to acquire a less-than-fee interest in property which may be an appropriate method to serve certain Program objectives.

1. A Brief Look at the Life and Times of the Easement

Under Illinois law, an easement is a privilege upon or in the land of another.[112] An easement may be either positive--giving the public certain rights to use the land--or negative--limiting the uses to which a landowner may put his land. The classic use of the easement device is to create a right-of-way for the benefit of A across the land of B.[113] The right does not interfere with B's ownership but B's land is nevertheless burdened by the right.[114] An easement to acquire a right-of-way across a beach held in private ownership would clearly fall within the recognized definition of an easement. However, such a right may be far too limited. For example, what about the right to bathe, to sun, to dock or to play volleyball? What about the right to put up tents or cabanas? If such rights may be thought of as involving easements, the matter must be explored further.

In Willoughby v. Lawrence,[115] a question arose as to the nature of a right granted to use fences and buildings for advertising signs. The court held that the rights granted included a right of entry to reach the same and the entirety of the rights created appear to have been characterized as, if not an easement, at least a "servitude in the nature of an easement."[116] The right to lay railroad tracks[117] and to install and maintain sewers[118] are all recognized as involving easements. More generally, the notion that an easement involves the use of the land of another for a special purpose[119] clearly supports the notion that the right to bathe, to sun and so forth, involves or could involve an easement. Decisions in other jurisdictions make it clear that the full panoply of beach uses can be thought of as involving easements.[120]

The rights above and beyond mere passage across another's land may present practical problems. The cost to the public and the resistance of private landowners to easements of the nature under consideration here may both be reduced if limitations are placed on the rights granted. For example, the party acquiring the easement may agree that use of the beach be limited to certain hours of the day, certain months of the year or to certain numbers of people at any given time.[121] Similarly, the party acquiring the easement could agree to provide certain improvements such as fencing or to provide certain services such as lifeguards and trash removal.[122] But these are all matters that could properly be the subject of negotiation between the public authority and the beach owner. Easement acquisition may prove to be desirable from both the public and private view. It is relatively economical from the public perspective when compared to acquisition in fee. If the easement is donated to the municipality the price of the interest will probably be deducted from the landowner's taxable income equal to the fair market value of the property rights donated.[123] To make the disposition more palatable the property owner should also receive a decrease in the assessed valuation of the property for local tax purposes.

In addition to the tax advantages, a landowner interested only in development may find that if he encumbers a scenic part of his land with an easement, the value of his remaining land may rise because of the guarantee of a scenic view. This increment, coupled with the tax deductibility of the gift, at least encourages some grant of easements within developed areas.[124]

Having concluded that the easement may be something worth thinking about as far as the Coastal Zone Management Program is concerned, the mechanics of this device should be considered. For these purposes, the questions to be examined involve the creation, construction, assignability, enforcement, and valuation of easements. Absent a statute specifically addressing the kinds of easements that might be acquired under the program, a rather murky and complex area of the law must be reviewed.[125]

2. Creation

Easements may be created in one of three ways: a writing,[126] by implication[127] or by prescription.[128] As a practical matter, the only way to proceed under the Coastal Zone Management Program would be by a writing.[129] This requirement does not seem very onerous. But it is sufficiently fraught with problems to warrant emphasis.

In order to benefit both the local government unit and the property owner, the easement terms must be explicit in order to give the landowner sufficient notice of what rights he has relinquished which will avoid the expense of litigation that might be caused by the owner's misunderstanding of, or disputing the easement terms. Precise definition is also imperative to determine the sale price of the easement.[130]

Because individual parcels of land vary and because the public objectives may also vary with the variety of lands encumbered, each easement must be individually tailored. The instrument creating an easement should contain two elements: it should state both the positive rights that the owner conveys to the government body and the uses and rights that the owner himself relinquishes. The easement grant instrument should also specify the term of the grant--for perpetuity or a certain term, and should not permit any restrictions of use in the landowner which will impair the public purpose to be obtained by the easement. General restrictions may also be placed upon the municipality's ability to accept a grant of easement, tying the grant to the adopted plan of the municipality. An interesting question is whether benefitted property may include real estate acquired subsequent to the grant of easement. It seems clear that it may not at least in the absence of specific language in the grant of easement reciting that the easement is for the benefit of, inter alis, subsequently acquired real property.[131] Whether an express reference in

a grant of easement to after-acquired property being benefitted thereby would be upheld or given effect does not appear to have been decided in our state.

3. Construction

Needless to say a great deal of care should be given to drafting the grant of easement and counsel for the public authorities involved must carefully supervise the preparation of the documents. It is at this point that court-made rules of construction become critical. As set out in the important case of Goodwillie Co. v. Commonwealth Electric Co.,[132] the rules of construction are as follows:

> 1. Agreements imposing burdens upon one estate for the benefit of another must be strictly construed;[133]
>
> 2. Such agreements, however, creating easements, must be so construed as to carry out the plain intent of the parties;[134] and
>
> 3. Moreover, if there is any ambiguity as to the meaning of this contract, the practical construction placed thereon by the acts of the parties can be resorted to to determine the meaning of the grant.[135]

The Goodwillie case involved, inter alia, the construction of a grant of way to lay, maintain and use railroad tracks. As previously noted, rights-of-way are the classic form or purpose of easements. But this factor was not enough to avoid the need to undertake complex and difficult litigation. The operative language of the grants[136] in the Goodwillie case was more or less as follows:

> Now, therefore, in consideration thereof and of the agreement hereinafter made by the said party of the first part, the said party of the second part do covenant and agree to and with the party of the first part that they will, within sixty days after they shall take possession of the lots so conveyed to them, as aforesaid, build a railroad track from the track now laid down by the Chicago, Burlington & Quincy Railroad Company immediately south of the south line of Twenty-Second Street, on a curve not greater than six hundred feet radius, to the center of Fisk Street, in Greene's South Branch addition,

and thence down the center of Fisk Street as far as the south line of lot 86 extended to the center of Fisk Street, so as that the same may be extended south of Fisk Street, and that said track, when so built, may be forever after used, in common with the said party of the second part, by any and all of the owners of other lots fronting on Lumber Street, between Mason's canal and Allen's canal, and of lots fronting on Fisk Street, in said addition: Provided, however, that the owner of each lot using said railroad track shall, before he shall be entitled to use the same, pay to said party of the second part such proportion of the cost of constructing said railroad track from the Chicago, Burlington & Quincy railroad to the north line of the south fifty feet of lot 82 as the width of such lot shall bear to the combined width of all the lots using said railroad, and shall thereafter pay the same proportion of the expense of keeping in repair said railroad track from the Chicago, Burlington & Quincy railroad as far as the same may be extended; and the said party of the first part on its part doth covenant and agree that the said party of the second part may, upon the faithful performance and observance by them of their agreement as herein contained, lay a second railroad track for the accomodation of said lots so conveyed to them, as aforesaid over the south twenty-five feet of the north fifty feet of lot 82, and that they may use and operate said railroad track upon and over said south twenty-five feet so long as they shall well and faithfully observe the stipulations herein contained and on their part to be performed. In testimony whereof the said party of the first part has signed these presents by its president and affixed its seal hereto, and said party of the second part have signed these presents and affixed their seals hereto, the day and year first above written.[137]

and

It is understood that Cutler, Witbeck & Co. are not bound to allow parties owning lots 101, 102, 103 to use the track which they construct from the C., B. & Q. R.R. track south of South Street to the south line of lot No. 86 unless they pay their proportion of the cost of the same.[138]

The foregoing language is quite detailed and the purpose of the easement would seem reasonably clear. However, among the problems arising under this grant were:

1. how many tracks could be constructed south of the south line of lot 86;[139]

2. whether the owners of lots 82 through 86, inclusive, were entitled to use switches and track south of the south line of lot 86;[140]

3. whether the easement could be used at any time of the day or night;[141]

4. whether the easement could be used for the benefit of land not covered or contemplated by the original agreement;[142]

It should be noted that the grant provides that the right involved shall be "forever". In the absence of such language,[143] the question of duration of the easement could also become the subject of litigation.

A grant of easement for "perpetual public beach recreational uses and purposes" might pose serious problems. The first is how "public beach recreational uses and purposes" are to be defined. Do they include volleyball? Sunbathing? Docking boats? Swimming? Constructing tents and cabanas? What about activities not yet known? Suppose use is made of the beach only from May to September. May it ever be used in, say, February? Suppose the particular beach is used by no more than 50 people at one time. When, if ever may 200 people, for example, use it simultaneously? Suppose the beach, pursuant to local government regulations, has not been used past 10:30 P.M. for some number of years? If that regulation were amended to allow use until 12:00 midnight, can the owner of the beach block the use of the extra ninety minutes?

Obviously many of these matters can be adequately dealt with by careful drafting of the documents. However, the risk of an unexpected judicial interpretation cannot be eliminated. The rule under Illinois law that grants of easements should be strictly construed is the source of the problem.[144] It must be remembered that even where an easement is acquired by gift or devise or by a friendly negotiated sale, the successors in interest of the particular landowner have the right to challenge the scope and extent of the easement.[145] Thus even friendly relations can turn sour over time, especially when the cast of characters changes.

4. Assignability

There is an ancient distinction in the law between easements appurtenant and easements in gross. The distinction lies in the fact that in the former case the holder of the easement is the owner of land benefitted by the easement whereas in the latter case, no land can be found or identified as being benefitted. Easements appurtenant can be assigned. Easements in gross cannot.[146] The distinction is of vital importance for any natural person or to any entity with a life of finite duration. Upon death, an easement in gross terminates. Where the easement holder is a public authority, the distinction may be of little practical importance. However, if that authority should cease to exist then there is a problem as to whether any easements in gross held by the public authority would also terminate.

The distinction may be of relatively little significance for another reason: to the extent that the holder of the easement is also the owner of the land used for recreational purposes, it may be agreed that any easements held by that public authority for such purposes are easements appurtenant since the benefitted land and the burdened land need not be adjacent, but need only be clearly defined.[147] But where the authority acquiring the easement does not hold lands benefitted by the grant of easement, the easement will be deemed to be in gross only.[148] The problem of termination of the easement upon the demise of the easement holder may also be solved by the General Assembly as it is empowered to abrogate these judicially imposed rules and expressly authorize governmental entities to acquire easements.[149]

5. Enforcement

As previously explored, enforcement of an easement is subject to strict rules of construction. But this is hardly the full extent of the difficulties. Even if one might agree as to the nature, character and scope of an easement, the question may arise as to whether the holder of the easement may, in certain circumstances, be barred or estopped from enforcing the grant.

The holder of an easement may, conceivably, abandon his rights under the grant in whole or in part.[150] What constitutes abandonment in any case is a question of fact.[151] But it is obvious that serious danger is presented if, for the appropriate number of years[152] the easement were not used, or were used only for limited purposes. The third rule of construction enunciated in Goodwillie[153] would, where the terms of the grant were ambiguous, point to a comparable or similar set of difficulties.

Great care should be taken to ensure that in instances where the public authority has agreed to make improvements or provide services that a violation or breach of those obligations does not operate to forfeit the easement. To the extent that any such forfeiture would be construed as a possibility of reverter[154] the enforceability of that forfeiture has been severely restricted by statute.[155] However, this much remains of the possibility of reverter: the maker or creator of the interest or his heirs[156] (but not any assignee or devisee of the maker) may enforce the possibility for a period of 40 years.[157] Interestingly enough, to the extent that any such forfeiture would be construed as a reversion,[158] the forfeiture would appear to be fully enforceable. Whether one could say that there can be a reversion expectant upon an easement is a question that can be considered perhaps in light of the broad pervasive policy in the law not to enforce forfeitures.[159] Yet, where the forfeiture is clearly expressed, it will be enforced.[160] The law is less than satisfactory on the point, but careful drafting of grants specifically excluding any forfeitures, of whatever kind, would alleviate the problem.

There is another aspect of enforcement that must be considered. If a landowner grants an easement across his land to his neighbor, then the rights of both parties can be understood. Suppose, however, that the landowner conveys his property to a third party; may the easement holder enforce his rights against the new owner of the burdened land? Or suppose the easement holder conveys his land. May the new owner enforce his rights against the owner of the burdened land? Or against the new owner of the burdened land?

The answer clearly ought to be yes in each instance.[161] However, to assure these results, the following should be done:

1. The grants should specifically state that they are for the benefit of the easement holder, his heirs, successors, and assigns and that they bind the owner of the burdened land, his heirs, successors and assigns; and

2. The grants should be recorded immediately.

With respect to the first point, the cases seem to hold that an easement appurtenant "runs with the land" and pass by deed or conveyance.[162] Presumably this result is obtained whether or not specific reference is made to heirs, successors and assigns. Indeed, in the Goodwillie case[163] the operative language did not specifically use such phraseology.[164] However, one finds reference to "owners" and the easement being "forever", in that language. To insure the continuity and enforceability of an easement a conservative view of the question is called for and appropriate terms should be used.

With respect to the second point. If the purchaser of the burdened land purchases the property without actual or constructive notice of the easement, he could conceivably take free of the burden of easement.[165] Recording the easement will provide constructive notice and protect the rights of the easement holder and those who succeed to his interest.[166]

6. Valuation and Acquisition Methods

Aside from the initial outlay needed to purchase an easement, it must be pointed out that the municipality will be subjected to other expenses. In addition to a possible reduction in property tax revenues if the assessed valuation of the property is reduced, there is also a loss of potential revenue in that intensive land development would increase the future tax base of the community. Also, the administrative expenses of acquiring and enforcing the easement may be considerable but would be an eligible 306 cost reimbursible expense. Such expenses include the cost of surveying, title examination, valuation fees and negotiation. If the easement is to be acquired by eminent domain there may also be litigation expenses.[167] Policing the restrictions once the easement is effectuated will present additional expenses.

Of course, the initial outlay for the purchase of the easement will undoubtedly be the greatest expense borne by the local government.

It would seem that the cost of an easement would be measured by the difference between the value of the land unburdened by the easement and the value of the land burdened by it.[168] For example, the value of scenic easements in California are measured in large part by the benefit that the owner would have received from development or from sale for development. Therefore, it is important for the governmental unit to effectively anticipate development pressure because once that pressure exists the landowner may be unwilling to encumber his land. If in that case the eminent domain power must be employed, the easement may be too expensive for local government.[169] However, developers may be willing to grant an easement for a reduced price as to a portion of their property in order to increase the value of their surrounding property. Regulatory measures already in effect, such as large-lot zoning may help to inhibit development potential, and thus keep down the costs of easements. The interesting question is whether the value of the land as determined should reflect these zoning, other land use controls and limitations.[170] To the extent that it can, the cost of acquisition in any given case could be reduced if fairly restrictive zoning regulations are imposed. Yet this creates an element of unfairness for if land is downzoned drastically so that the land or interests therein might thereafter be acquired more cheaply the courts may disregard the downzoning entirely. In any event skilled real estate appraisers will be needed to aid in determining the cost of any particular easement.

Uncertainty over the valuation of the rights the owner relinquishes may be an obstacle to the purchase of easements, as the government's valuation is subject to negotiation with the landowner. The basic valuation formula that has been suggested by appraisers and commentators equates the consideration paid the landowner with the difference between the value of the land given its highest and best use before the imposition of restrictions (the "before-value") and the value of the land given its highest and best use after the easement restrictions are in effect (the "after-value"). The two crucial variables are the present or potential uses of the land and the severity of the restrictions imposed upon the land. There is a compensable loss in property value whenever restrictions impinge upon present or potential uses. However, only those potential uses which are reasonably foreseeable should be relevant in determining the "before-value." Market date is helpful in making the distinction between reasonably foreseeable and speculative uses--potential value not already reflected in the present fair market value of the land should not be included in determining the before-value of the land.[171]

If an easement program is to be undertaken by units of local government, it will be necessary to devise financing techniques for the project. Economic benefits may accrue to the public as a result of open space preservation for various reasons--less intensely developed land requires fewer public services and property values of nearby land may rise due to the open space which will be reflected in the property tax assessment rolls--yet the local government unit must expend substantial amounts to acquire the easements prior to such times as these benefits may accrue.

Funds to acquire easements may come from the local level. However, these units may find it difficult to expend moneys on environmental projects when other public services and utilities are lacking. Yet, this view appears rather shortsighted, as the benefits of perpetual easements will accrue to this and future generations. Furthermore, units of local government may also look to the state and federal governments as the benefits of open land are not strictly local.

At the state level, the acquisition of easements may be considered a significant objective of the Program's state/local partnership and benefit from the Program's funding. The California Legislature's Joint Committee on Open Space Land concluded that much of the financial burden of open space protection must be assumed by the state since the benefits of an open space program will be shared by all residents of the state; the Illinois General Assembly may adopt the same view.[172]

The federal government offers a third financing alternative under the Open Space Land Program of the Department of Housing and Urban Development.[173] Since its inception in 1961, the Program has provided matching grants to state and local governments for the acquisition of

land for conservation, recreation and historic preservation purposes. Open space easements may be acquired with the use of HUD funds, provided, the easements acquired are in perpetuity. HUD also requires the unit of local government to show comprehensive land use planning for the area in which the proposed open space project is to be located. HUD must approve the open space easement proposal in advance of the acquisition, including the easement restrictions and the fair market value of the interest. The proposed project's ability to meet open space needs is also assessed, taking into consideration the following factors: the effect in the environment, including the preservation of ecologically significant areas such as wet lands and sand dunes; the population served; the patterns of urban growth; and the danger of losing the site.[174] Thus, HUD's Open Space Land Program may have potential as a source of financing easement acquisition programs within the Program Management Area.

7. A Brief Look At The Life And Times Of Things In The Nature of Easements

The classic kind of interest under consideration is the building restriction. Unlike an easement which confers upon the holder thereof the right to enter the land of another for specified purposes, a building restriction confers upon the holder thereof the right to prevent the owner of the burdened land from performing certain acts. Any right to "enter" the burdened land is, in nearly all cases, mere legal fiction. But it is clear under Illinois law that the right to prohibit, as outlined above, is "something in the nature of an easement."[175]

Building restrictions can be thought of as private zoning as the restrictions may be concerned with land use[176] and set-backs.[177] Subject to the general rule that building restrictions must be reasonable,[178] they may also establish minimum construction costs[179] and specify building materials,[180] matters traditionally not addressed under zoning regulations.[181]

With the advent of zoning, the use of the privately created building restriction has lost some of its importance as a basic tool for the regulation of the use of land.[182] However, in recent years, partially in response to perceived limitations of the police power with respect to scenic, open space and historic conservation and preservation, the use of building restrictions to accomplish the foregoing objectives has steadily increased.[183]

What is usually sought to be accomplished by the acquisition of so-called scenic, conservation or preservation easements are some or all of the following precise objectives:

1. Absolute prohibition against development on the burdened land (or some portion thereof);[184]

2. Prohibition against development unless approved by the holder of the restriction;[185]

3. Prohibition against all but very limited kinds of specified development;[186] and

4. Prohibition against any change or alteration of existing development, absolutely, subject to the approval of the holder of the restriction, or subject to certain specified standards.[187]

It is precisely because limitations on development are severe under such restrictions that it has been believed that rights must be acquired in land rather than simply relying on the police power. Whether this conclusion is necessarily true in all cases is subject to some dispute.[188] But there is no doubt that the restrictions are substantial.

The possible applicability of such restrictions to the Illinois Coastal Zone Management Program is obvious. Open space, scenic, conservation and historic values can be found in and around the Illinois lake shore and there is no doubt that they are worth preserving and enhancing. Indeed, the Coastal Zone Management Act[189] makes reference to these and other values.[190] The only question, one which turns on a variety of legal, policy and practical considerations, is whether these values can be preserved under the police power or whether, to some extent or degree, interests in real property must be acquired. Assuming, arguendo, that such interests must be acquired, at least in certain cases, the inquiry then shifts to the nature or character of those interests. As noted earlier, the interests are "something in the nature of an easement." Not surprisingly, the law with respect to building restrictions is at least as complicated as that with respect to easements.

8. Creation

Building restrictions must be created by a writing, or in the case of subdivision development, by appropriate notation or delineation on the plat of subdivision.[191] For present purposes, the restrictions to be acquired would not, in general, be a part of a subdivision development process. Accordingly, the quality of the writing takes on major importance for the same reasons as in the case of easements.

9. Construction

It should not be surprising that building restrictions are subject to rule of construction that resolves all doubts in favor of the free use and

enjoyment of the burdened property. Such is, indeed, the law.[192] Some rather interesting, if not troublesome, results have been reached in cases decided under this rule.

For example, a restriction against the construction of a stable was held not to bar a garage,[193] a restriction to a "one dwelling house" was held not to restrict a two-flat,[194] and a restriction against business buildings was held not to prohibit the construction of an apartment building.[195] However, a restriction to a "private dwelling house" was held to prohibit an apartment hotel.[196]

In those instances where the restriction prohibits all development absolutely, the rule of construction would not appear to present any great difficulty. The same would be true in those cases where development would be allowed only if approved by the holder of the restriction. It is only in those cases where certain specified development is allowed that the rule could wreak havoc unless the restrictions are carefully and precisely drafted.[197] But the problem is that for a variety of practical reasons, including cost to the public for acquiring a restriction and ease of negotiation, some effort at listing permitted land uses might be made.

10. Assignability

There is no reason to think that the distinction between easements appurtenant and easements in gross would not apply equally to building restrictions. It is well established that building restrictions may "run with the land."[198] Without going into great detail, this doctrine suggests that the common law predicates for finding that a restriction runs with the land or binds the successors in interest to the burdened land, also apply in the case of building restrictions.[199] The absence, therefore, of a dominant or benefitted estate could be said to give rise to building restrictions in gross.

In the case of subdivision development the question almost never arises. This is because restrictions imposed on various lots in a subdivision are for the benefit of other lots in that subdivision. Indeed, the classic situation involves restrictions on all of the lots for the benefit of all of the lots: each lot is both burdened and benefitted by the restrictions imposed by the subdivider. As far as the Illinois Coastal Zone is concerned, however, it is doubtful that the subdivision approach will be used.[200] Therefore, all of the problems of assignability noted in connection with easements[201] may be said to exist here as well.

11. Enforcement

Problems of enforcement of building restrictions are very serious ones. The rule of construction[202] is only one aspect of the difficulty. Even if there were no dispute as to the sense or meaning of a particular restriction, considerations of waiver and change of circumstances may operate to bar enforcement of the restriction.

A restriction may be waived, in the subdivision context, by acquiescence in or to repeated violations of the restriction.[203] For example, if a subdivision containing 100 lots contains a building-line restriction, it may be impossible to enforce the limitation if 40 lot owners were allowed to violate the restriction without appropriate challenge. But frequently there is more than one restriction involved. For example, in O'Neill v. Wolf,[204] acquiescence to repeated violation of a set-back restriction was held not to constitute acquiescence to a violation of a land use restriction preventing commercial uses. The question in any given case is whether the substance of the general plan (i.e., a series or set of restrictions) has been compromised. If the "plan" has been compromised, then the restrictions may be unenforceable.[205] The thorny question is whether the notion of a "general plan" would include the Coastal Zone Management Program--although no subdivision is involved, if the public authorities administering the Program acquire a series of interests in various parcels of land restricting their use and development, is the "plan" compromised if the authorities acquiesce in violations by a significant number of the owners of burdened land so that the restrictions may not be enforced as against any of the other property? The answer appears to be that the "plan" is compromised by such acquiescence and the restrictions are unenforceable.

Support for this conclusion is found in the doctrine of changed circumstances. It is well-settled in Illinois that if a change in condition makes the restriction impossible of accomplishment,[206] makes it unfit or unprofitable to enforce the restriction,[207] or makes it harsh or inequitable to enforce the restriction,[208] then the restriction will not be enforced. Changes due to factors beyond the control of the holder of the restriction can destroy the restriction. But changes can be due to the action--or non-action--of the holder. Acquiescence in repeated violations may have the effect of creating a change in circumstances that would make enforcement inequitable, to say the least.

The holders of building restrictions in the Coastal Zone could be the same governmental units charged generally with administering a Management Program. Consequently, since management connotes control, in some degree, changes in circumstances can be controlled. But once again, only to some degree. Actions of other levels of government could result in changes that could jeopardize the enforcement of particular building restrictions. Although as Section 6 of the Coastal Zone Management Act

indicates that governmental action at other levels should not affect the Program but the Act does not, indeed, cannot, guarantee that such would never happen.

More importantly, the actual management of the Illinois coastal zone will necessarily involve change over time. Thus it is likely that building restrictions may become unenforceable because of the nature of changing management to reflect the changing circumstances within the coastal zone. This may mean nothing more than the notion--if not the belief--that the Management Program itself will change over time and that new solutions to new problems will have to be found.

Finally, the problem of who is bound by the restrictions in a technical sense must be considered. As is the case with easements,[210] the language of the restriction should clearly bind or benefit successors in interest and the restrictions should be recorded immediately.[211]

12. Valuation

The problems of the valuation of building restrictions are identical to those considered in connection with easements.[212] It should be noted that the more severe the building limitation, the more expensive the restriction becomes. The same point can be made about easements--the greater the scope of public use, the higher the cost of the right to make such use.

13. Summary

We have looked at two types of less-than-fee interests the acquisition of which in selected cases might be useful in the execution of a Coastal Zone Management Program for Illinois. Out of the full panoply of such interests, which include life estates, leasehold interests, future interests, licenses, liens and encumbrances, two were closely reviewed: easements and building restrictions as they lend themselves to public control necessarily vital to any successful Management Program, but do not oust the landowner from his ownership or possession, which, hopefully, will minimize the costs of acquisition.

While there are serious problems involving, in particular, the construction or interpretation of easements and building restrictions and their enforcement, careful drafting can solve many of these problems. Indeed, we would recommend that consideration be given to the preparation of model easements and building restrictions responsive to the unique circumstances of the Coastal Zone and its appropriate management.

Serious consideration should also be given to curative legislation that would eliminate some of the problems under existing law that even careful drafting may not be able satisfactorily to resolve. Such enabling legislation is typified by the Preservation of Historic and Other Special Areas Act[213] which sets forth the type of less than fee interest a municipality may acquire and the case law formalities that it discards:

> A preservation restriction is a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to the preservation of areas, places, buildings or structures to forbid or limit acts of demolition, alteration, use or other acts detrimental to the preservation of the areas, places, buildings or structures in accordance with the purposes of the (Act). Preservation restrictions shall not be unenforceable on account of lack of privity of estate or contract, or of lack of benefit to particular land or on account of the benefit being assignable or being assigned.[214]

The statute may be useful, as it now stands, for municipalities in many situations that might arise in connection with Coastal Zone Management. However, it is a part of an act concerning historic preservation, so that questions may arise as to the applicability of the provision to preservation of natural scenic or open space values.[215] Accordingly, a statute of somewhat broader scope applicable to the coastal zone generally might be more appropriate. Should such a statute be proposed, we would strongly urge the inclusion therein of language expressly reversing the rules of construction.

The Illinois Preservation of Historic Areas and Other Special Areas Act expressly provides that it is not applicable to home rule units,[216] thus, it appears that enabling legislation from the state will not be necessary for home rule units which may enact a similar ordinance under their home rule powers. The above-cited section of the Historic Preservation Act has not been judicially construed, however, Professor John Costonis, the draftsman of the Act emphatically stated that, "[t]he validity of the preservation restriction is assured by the Illinois statute."[217] While this statement may appear overly confident, it is significant to note that easement acquisition programs authorizing acquisitions by purchase or condemnation in other states have received judicial approval.

Kamrowski v. State of Wisconsin[218] is the leading case upholding the constitutionality of using the eminent domain power for scenic easements. The Wisconsin Supreme Court upheld the State Highway Commission's power

to use the power to compel scenic easements in perpetuity. Plaintiff contended that public enjoyment of scenic beauty of certain land was not a public use of such land. The court rejected this contention, holding that the public enjoyment of the scenic area was a public use of the land, although the scenic easement was not physically utilized by the public. Therefore, the case condones the use of both positive and negative easements. Similar conclusions were reached by the courts of Ohio,[219] Maryland,[220] and Maine.[221] The Illinois courts also employ a public purpose test whenever a unit of government seeks to acquire property by purchase or eminent domain. As the court stated in Krause v. Peoria Housing Authority:[222]

> The power of the State to expend public monies for public purposes is not to be limited, alone, to the narrow lines of necessity, but the principles of wise statesmanship demand that those things which subserve the general well being of society and the happiness and prosperity of the people shall meet the consideration of the legislative body of the State, though they often times call for the expenditure of public money. If it can be seen that the purpose sought to be obtained is a public one and contains the elements of public benefit, the question how much benefit is thereby derived by the public is one for the legislatures and not the courts.[223]

There seems to be little justification in contending that the acquisition of easements for use by the public and/or to preserve open space land does not come within this flexible definition. While non-home rule governmental units currently are not empowered to acquire such easements, the General Assembly may be willing to enact enabling legislation similar to the Historic Preservation Act, in order to preserve open space within the Program management area.

As a coda to this Section, the problems of administration of less-than-fee interest must be reiterated. In the case of easements, the right to use the land of another, it will be necessary to ensure that the use actually made conforms with the spirit, if not the letter, of the grant of easement. In the case of building restrictions, activities of the owners of the burdened land will have to be monitored to ensure that they comply with the letter and spirit of the restrictions. All of this involves time, manpower, and therefore, money. In situations where viable alternatives exist, cost of administration under the various alternatives would need to be given serious attention. The cost of an interest in land is not the only expense that must be borne. But while these matters are impossible to judge in the abstract, it can be said that the more complicated the restriction, the greater is the probable cost of administration. Simplicity does have a certain virtue after all.

CHAPTER VI
PERFORMANCE STANDARDS

As noted in a previous chapter of this Report, the performance standard approach to land use management has been utilized by shoreline municipalities within the context of their planned development, special use and special district techniques. The performance standard approach is grounded in the premise that each use of land produces or creates certain by-products that may adversely affect the use of other land. Therefore, in order to protect the safety and well-being of individuals, as well as to prevent one user of land from being denied the most beneficial use of his land by another, neighboring user of land, communities are increasingly seeking to protect uses of land from the undesirable qualities or by-products of other uses of land.

The performance standard approach is applied in varying degrees by municipalities in Illinois, however, its use has been articulated as an application of traditional nuisance controls to regulate land use and thus, is incorporated as an element of broader regulatory techniques. Illinois municipalities have yet to attempt to discard other regulatory techniques in favor of a system based solely on performance standards.

Generally, performance standards are utilized in three different ways. First, they may be employed as a regulatory technique in tandem with a land use pattern scheme that is less restrictive than the more traditional Euclidian district pattern commonly employed. In this fashion each parcel is judged by applicable performance standards. The second technique is to impose performance standards throughout an entire municipality, as an overlay to the limitations imposed by traditional districting. Finally, performance standards may be employed only in particular districts whose uses lend themselves to objective measurements. A common example is the use of performance standards in industrial districts and environmentally sensitive areas such as the shore and inland areas are also well suited for the employment of these objective standards. This method is utilized in many of the coastal communities under their planned development ordinances. Depending on the objectives to be served, the performance standards imposed will vary as is indicated in the following discussion of each of the above-enumerated performance standard techniques.

1. Performance Standards in Lieu of Use Districts

The most far-reaching use of the performance standard technique is its implementation as a land use management tool, independent of the more

traditional forms of land use regulation. This constitutes a departure from the more traditional approaches in that performance standards are designed to focus on how the land functions rather than on what is placed on the land.

Performance standards afford an approach that varies from the traditional Euclidian principle of establishing a hierarchy of land uses in terms of broad categories and thereafter protecting the higher uses from the lower uses by segregation into use-districts. In contrast, this performance standard approach affords protection from undesirable by-products by imposing various performance standards on each use of land. These performance standards would specify a maximum level of by-product production, to which each use of land must conform. For example, sounds emanating from any use could not exceed a maximum permissible sound level, measured at the use's property line. This type of ordinance could provide for an even lower nighttime level of performance, and for specified deviations not to exceed so many minutes.[224] Other specific by-products a shoreline municipality could regulate include smoke, noxious gases, fire hazards, wastes, dust and dirt, glare, heat, odor, traffic, electromagnetic emissions, radioactive emissions, aesthetics, psychological effects and present particular problems as they are not capable of precise measurement or specific standards, aesthetics could be controlled indirectly by intensity of use requirements and buffer requirements, such as walls, trees and shrubs. Municipalities could establish review boards to determine whether a particular use may have psychological effects and upon such determination require the effects to be alleviated at least in part by imposing requirements on the permissible location of these uses. In addition, other regulations may be imposed upon these uses, such as large buffer strips to further minimize any adverse impact. Shoreline municipalities may also control height and intensity of land use as is authorized under state zoning enabling legislation.[225]

These regulations may be expressed in broad nuisance terms to exclude certain undesirable uses of land, however, the preferable method is to specify the acceptable levels of performance in terms of available scientific data, whenever possible. Regulations based on objective data rather than nuisance terms held to reduce the problems caused by overly broad definitions which fail to properly inform an individual planning new or expanded uses of land of precisely what performance is expected of his use. Furthermore, overly broad standards, by their very nature, are susceptible to all of the improprieties possible in completely ad hoc administrative determinations.[226]

To date, an increasing number of municipalities have enacted standards based on scientific data for use within their industrial zones. Certain modifications of these standards must be made to enable efficient utilization on a community-wide basis. For example, requirements varying in terms of use-district boundary lines would not be applicable. Instead, the property lines of each use would be the sole point of measurement.

Some commentators contend that the application of performance standards to uses other than industrial uses is largely meaningless because the other uses do not produce substantially similar objectionable by-products.[227] The non-production of most of these by-products by many uses is certainly accurate. But residential use occasionally produces undesirable by-products, such as excessive noise from air conditioning units. Small commercial enterprises often produce such by-products as traffic, solid wastes, and odor. Therefore, although the actual application of performance standards to uses other than industrial or large commercial uses may be infrequent, the protection afforded by their application when needed makes community-wide application useful. In addition, the contention that favored uses do not produce objectionable by-products appears to incorporate the assumption that uses should continue to be separated even though the reasons for their incompatibility cannot always be identified, described or made to appear in harmony with current values. The application of these reasons for segregation of uses has been the basis for use-district proliferation under current land use systems, however, they are not necessarily valid reasons for rejecting an alternative system.

Another point raised presents a more difficult problem. Since technology, to date, has not developed sufficiently to provide adequate equipment or processes to control the emission of some by-products by certain uses below the required levels of performance, there will be some uses of land that will not be able to comply with the performance standards. In coping with this problem, one alternative is for communities to simply exclude all such uses. However, the potential adverse consequences on other communities in the region make it an undesirable alternative. There are some objectionable uses of land which are necessary in any region. If one community excludes them, necessarily another will have to accomodate them. From a regional perspective, exclusion of many or all of such uses by various communities may eventually result in necessary uses being excluded from the region.[228]

Yet another alternative would be to grant variances to these noncomplying uses, conditioned upon subsequent performance if and when new devices or methods are developed that can lower their production of adverse by-products to a permissible level. The requirement of additional performance upon the development of new techniques is to prevent any possible claim concerning a vested right to continue noncompliance.[229] Furthermore, if there were no use district zones, the possible adverse impacts that the granting of variances could have on many uses in the community should be considered. The granting of variances coupled with regulations concerning their location, however, may be an acceptable alternative. By establishing certain areas with topographical features that will aid in alleviating the adverse impact of these by-products, a community may be able to reduce those by-products to the permissible level before they reach other land uses. If topographical features are

not available, or are not adequate, protection could be provided in the form of open space or other buffers that would perform the same function.

By employing performance standards in the manner described, a community may be able to afford greater protection for individuals and other uses of land than is presently being provided by current regulatory techniques. In addition, and of almost equal importance, by employing performance standards rather than traditional techniques, a community may mix uses of land much more freely. The major significance of mixed uses is the flexibility possible in the planning of use location, as is demonstrated by the favorable response given to planned developments.

If performance standards were enacted without any controls on the location of uses, then any use, with the exception of the noncomplying uses discussed above, could locate anywhere in the community. The probable result would be a chaotic community land-use pattern. Land-use planning is grounded on the premise that a community should be more than a scattering of various land uses, even if each is protected from the adverse by-products of the other uses. Communities should be designed to accomodate people's activities in the most efficient and livable manner--by so designing a community, there will be a reduction in the amount of physical and mental strain imposed on individuals and a reduction in the expenditure of public funds brought about by the elimination of duplicitous public facilities made necessary by irrational land-use patterns, as well as providing a greater opportunity for individual participation in the various amenities offered by municipalities. Regulatory techniques should be designed in a manner that will permit a community to create a rational relation in terms of peoples' activities among the various uses of land within a community.[230]

There are several possible techniques for locational planning of uses that could be employed in connection with performance standards without relying upon traditional districting schemes. One is the promulgation of a detailed plan of community development specifying exactly how each tract of land can be used. Yet, such a plan may prove to be so inflexible that changing conditions may not adequately be taken into consideration. Or, shoreline municipalities may employ an ad hoc administrative approval system. However, this alternative appears to be the antithesis of planning and is therefore unacceptable. Planning is the rational application of means to achieve predetermined ends. There would be no predetermined ends in an ad hoc administrative system, but rather case by case decision that may possibly be based on considerations other than the production of a rational land use pattern.

Between these extremes lies an acceptable alternative--locational policy plans. Planning experts have recommended that the use of technical and specific master or general plans be abandoned in favor of policy development plans.[231] The locational plan would be one part of this

overall policies plan. A policy locational plan would describe the desirable relationship of uses in terms of each other and the availability of community facilities, however, it would not identify specific sites on a map of the city for each type of use. Two provisions of the King County, Washington Comprehensive Plan exemplify the types of provisions that could be contained in a policy locational plan:

> The high densities of multiple residential use should be located adjoining either major shopping areas, cultural centers (at urban or multi-community level), or locations having special amenities of view, water access, or permanent open space.
>
> The lower densities of multiple residential use shall be located adjoining or convenient to major or secondary arterial streets.[232]

A locational plan devised in terms of policy considerations of location would contain the needed flexibility for coping with changed demands. By focusing on a policy that has implications community wide, shoreline communities should be equipped to better clarify both the present and long-range impacts of a particular proposed change. The locational policy plan, unlike completely ad hoc determinations, would contain goals and guidelines for administrative decisions concerning the location of uses. These guidelines, coupled with adequate administrative procedures, should make this alternative legally permissible.

Many coastal zone communities already have general plans that contain policies concerning the location of land-uses. In these communities a locational policy plan may require little more than making the policy more detailed. In those communities already having a policy plan, such as King County, Washington, for the only change necessary would be the adoption of performance standards community-wide. Thus, this particular performance standard approach would contain two primary regulatory techniques--performance standards to provide protection from undesirable by-products of land uses, and a locational policy plan to shape the urban design in terms of peoples' activities.

2. Performance Standards to be Utilized in Combination With Existing Techniques:Community Wide Implementation

Although the preceding discussion presupposes that a performance standard approach to land use management will be adopted throughout a shoreline municipality, this technique may be implemented more narrowly, as is demonstrated by the utilization of performance standards in industrial districts by the City of Chicago. Moreover, performance standards

may be incorporated as part of a broader based regulatory technique. Thus, performance standards may be imposed as an "overlay" on an entire municipality. The development of environmental performance standards--specific, measurable levels at which the key functions of areas must operate--may be preferable to a comprehensive performance standard program which abandons the use of existing regulatory techniques.

The use of the performance standard technique as an overlay for an entire community is utilized by the Township and the Burough of Princeton, New Jersey.[233] The Township and Burough recently enacted identical ordinances authorizing their joint Regional Planning Board to grant or withhold approval of site plans for proposed developments, based on ecological and environmental standards. The impact of the ordinance is quite broad in that no building permit will be issued unless it has first been approved pursuant to the ordinance. The only exceptions to coverage provided are for single- or two-family dwellings, and only after a determination is made that the proposed construction contains no indicia of a major residential subdivision. A special Environmental Design Review Committee was established by the ordinances to assist the Regional Planning Board and to initially review the proposed site plans. The unique feature of the ordinances are their "Criteria and Standards," the binding guidelines the Planning Board must follow in making their determination on development approval and on imposition of site improvements in certain instances. The traditional criteria for site plan review are provided for, however, ecological considerations are also set forth in the "Criteria and Standards". The provisions call for no increase in storm water runoff, a minimum impact upon aquifer recharge and minimum degradation of "unique and irreplaceable land types" and "critical areas."[234] The ordinances also require that applications[235] be documented with information on a great variety of environmental factors, such as soils and surface geology, potential air pollution and proposed changes in natural drainage and submitted with plans for control of stream sedimentation and soil erosion both before and after construction.

Commentators are wary that the new ordinance will not withstand judicial attack on the ground that it exceeds New Jersey's enabling legislation.[236] Although site plan review ordinances are valid in New Jersey,[237] the Princeton ordinance exceeds those areas of control and review formerly condoned by the courts. Furthermore, the ordinance provides specifically that, prior to granting approval, an applicant must agree to the installation and maintenance of improvements, or to limiting development, where it is deemed "necessary" as determined under the environmental criteria. Moreover, if the applicant fails to install or maintain such mandated improvements, the municipality may do so itself at the developer's expense. The developer is further required to grant such rights and easements as are also "necessary." Although the validity of the Princeton ordinance is yet to be determined, its provisions may serve as a guide as to the types of environmental factors which should be considered under

a performance standard approach which may be utilized at the permit stage of development.

3. Special District Implementation

Alternatively, environmental performance standards may be implemented only in specific areas, such as the Program management area, which consists of environmentally sensitive land. Such a system is especially apropos for this area, as:

> The necessity for governmental involvement in environmentally sensitive land comes from the essentially public character of these land resources. When we talk about the destruction of environmentally sensitive areas we do not mean just the possible loss of some "intrinsic" environmental values or benefits, but also loss to the social and economic welfare of a community. Environmentally sensitive areas are land areas whose destruction or disturbance will immediately effect the life of a community by either (1) creating hazards such as flooding and landslides, or (2) destroying important public resources such as water supplies and the water quality of lakes and rivers, or (3) wasting important productive lands and renewable resources. Each of these threatens the general welfare of a community and results in economic loss. The direct costs of not protecting these areas can be high. In the private sector, costs may include the reduction of property value or the actual destruction of property; in the public sector, they include finding alternative sources of water or installing expensive storm sewers and water purification systems.[238]

Both the objectives of a regulatory program for the management area and the regulatory procedures to be utilized are well-known. The public objectives of this type of performance standard program include the protection of public safety by reducing the risks of flooding and drought; the prevention of nuisance-like uses of land by controlling erosion, run off and water pollution; and the reduction of future governmental costs by preserving public water supplies. The regulatory program may be implemented by the imposition of an overlay district. In addition to the segregation of uses, which is accomplished by existing regulatory techniques, performance standards set a specific measurable level at which the key functions of the management area must operate. Environmental per-

formance standards simplify the administrative process because a landowner, in order to comply with the standards must simply have his development certified by a licensed engineer or hydrologist as meeting the public standards. Subjective determinations are largely eliminated. In addition, if, after development, the project does not meet the standards, the developer may be subjected to penalties and corrective measures.

The goal of environmentally oriented land-use regulations is to maintain natural processes as land undergoes change for man's use. In contract to Euclidian districting techniques that attempt to implement this goal by prohibiting uses which are likely to have a heavy impact on natural processes, performance standards are better equipped to implement this goal by identifying and protecting the functions which provide important public benefits. Thus environmental performance standards are similar to industrial performance standards in that they set a level at which land use may function without harming other land uses, or more specifically, the environment.

A performance standard program for the management area should begin with a determination of certain policy considerations. First, the functions of the land should be defined. Second, the boundaries must be set, which is a critical determination. While a more stringent program may be imposed in the shore and hazard area, the effect that the inland area has on these lands must be considered as it is well known that inland areas have a tremendous influence upon the more sensitive lands. Therefore, a set of performance standards although less stringent than those placed on the shore and hazard areas, may be necessary for inland areas to assure that the more environmentally sensitive areas are not harmed by the use of surrounding property. Third, the importance of runoff to the shore and hazard areas should be recognized and accomodated as the rate of runoff along with the amount of sediment and chemical pollutants it carries is crucial to the well being of all of these areas.[239]

The use of performance standards in the management area may prove to be especially effective in that rather than maintaining the predominantly negative function of restricting use, the shoreline communities can identify the positive features of the land it needs to preserve, thereby granting the landowner greater flexibility in his use decisions. Another significant factor weighing in favor of the use of this performance standards program is that special state enabling legislation is not required for non-home rule units.[240] In Dube v. Chicago,[241] plaintiff challenged a portion of the Chicago zoning ordinance that not only prescribed the uses permitted in an industrial district, but also required that such uses be conducted within certain noise levels. Although proceeding on a nuisance theory, the Illinois Supreme Court stated that, as to provisions of zoning laws prescribing conditions of business or manufacturing:

> The cases hold that so long as such ordinances have as their object the protection of the public health, safety, comfort, morals and general welfare, are reasonably calculated to effect that purpose and are not arbitrary or unreasonable, they are to be upheld as a proper exercise of the police power. The tests applied are the same as those applied to zoning ordinances generally which must be justified, if at all, by the paramount interest of the public welfare and the realization that private interests must sometimes be subordinated to the public good. The constitutional declarations that private property shall not be taken for public use without just compensation or without due process of law are always subordinated to the interest of the public welfare as expressed through the exercise of the police power of the State.[242]

In a subsequent case, the Illinois Appellate Court upheld the authority of the City of Chicago to require an applicant for a special use permit to show that the proposed special use would conform to the performance standards set forth in the ordinance for the district in which the special use was to be located.[243] Thus, it appears that performance standards imposing environmental conditions upon the use of land which must be complied with prior to commencing development will also meet the test set forth in Dube.

The American Society of Planning Officials in its Advisory Report[244] suggests that there are inherent advantages in moving away from specification standards normally imposed under land use management ordinances toward performance standards. As it points out, specification standards tend to stifle technological progress while performance standards tend to encourage it. Furthermore, a performance standard ordinance reduces the need for drafters of the ordinance to know about and test all available materials and processes. Instead, the proponents of the new material or process must prove that it does perform as required. As is succinctly pointed out in the report, "performance standards are concerned with results and not with the type of material used."[245]

An environment performance standard program must identify the natural processes that are closely associated with the public health, safety and welfare. Specifically, these are processes such as runoff, erosion, and groundwater infiltration which are closely linked to maintaining public water supplies, preventing hazards from floods and droughts, and preserving water quality in lakes and rivers. Thereafter, the community establishes a specific (preferably numerical) level at which the natural process should operate, and any development of the land must be done in such a way that the natural process continues to function at this level. With

this direct environmental performance regulation, all uses must meet the same standards for preserving or maintaining natural processes. The distinction between permitted uses and special uses is thus removed.[246] Environmental performance standards do not replace standard land use management techniques; instead they parallel or supplement them by providing regulations maintaining environmental systems. Their primary advantage lies in the fact that they remove one traditional element of the segregation of uses so that those decisions can be made in terms of other policy considerations independent of the uses' effect on natural processes.

The critical factor in determining the feasibility of performance standards for natural processes is the technological feasibility of setting precise numerical measurements on the process. To date, there has been comparatively little effort directed toward extending the research acquired on behavioral relationships of natural systems into the area of land use management. Therefore, research models must be developed to devise a system to regulate natural processes. At the initial stages, it may be difficult to determine if the data acquired will be accurate enough to evaluate the precise nature of development decisions, if the use of the method would require specialized training on the part of the administrators of the regulations; or if the necessary monitoring and follow-up procedures would be too costly for the community.[247] However, despite these risks, it may be worth while to begin the development of a performance standard approach, as this approach will both increase the potential for the multiple use of land while at the same time preserving the natural processes and functions of the land.

F O O T N O T E S

1. 130 Ill. App. 2d 566, 264 N.E. 2d 215 (1970).
2. Id. at 571.
3. Id.
4. Anderson, 3 American Law of Zoning §15.01 (1968).
5. 89 Ill. App. 2d. 257, 264, 232 N.E. 2d 816 (1968).
6. Forbes v. Hubbard, 348 Ill. 166, 181, 180 N.E. 774 (1932).
7. 380 Ill. 275, 43 N.E. 2d 947 (1942).
8. Id. at 280.
9. 57 Ill. 2d 415, 312 N.E. 2d 625 (1974).
10. Id. at 424.
11. Id. at 432, 433.
12. Ill.Rev.Stat. ch. 24 sec. 11-13-1 (1975).
13. 319 Ill. 84, 149 N.E. 2d 784 (1925).
14. (Emphasis added).
15. See, e.g., Brown v. Gerhardt, 5 Ill. 2d 106, 125 N.E. 2d 53 (1955).
16. 122 Ill.App. 2d 117, 257 N.E. 2d 798 (1970).
17. 69 Ill.App. 2d 248, 215 N.E. 2d 829 (1966).
18. 32 Ill. 2d 295, 205 N.E. 2d 464 (1965).
19. Id. at 298.
20. See, e.g.
21. 398 Ill. 202, 75 N.E. 2d 355 (1947).
22. Id. at 206, 207 (citations omitted).

23. Used for example in the issuance of building permits.

24. For example, uses of an administrative appellate system, the zoning board of appeals final order powers vis-a-vis variances in Chicago, Highland Park, Evanston and the Chicago Plan Commission final order powers under the Chicago Lakefront Protection Ordinance. Zoning amendments, variances in Winnetka and subdivision amendments are examples of legislative amendment systems.

25. Cosmopolitan National Bank v. City of Chicago, 27 Ill. 2d 578, 190 N.E. 2d 352 (1963); Bierek v. Village of Montgomery, 67 Ill.App. 2d 403, 214 N.E. 2d 149 (1966).

26. Ill.Rev.Stat. ch. 24 sec. 11-13-12 (1975).

27. Ill.Rev.Stat. ch. 34 sec. 3152 (1975).

28. American Law Institute, A Model Land Development Code. Tentative Draft No. 1 (1968).

29. N.Y. Gen. City Law §20 (McKinney 1975).

30. Ky.Rev.Stat. sec. 100.261 (1975).

31. Ann. Law Mass. ch. 40A sec. 6 (1975).

32. Conn.Gen.Stat. ch. 124 sec. 8-3 (1975).

33. Joint Committee of the Illinois Bar, on Local Government Affairs (1974).

34. See, e.g., Ill.Rev.Stat. ch. 24 sec. 11-13-16 (1975).

35. See, e.g., Ill.Rev.Stat. ch. 24 sec. 11-13-14 (1975).

36. Ill.Rev.Stat. ch. 24 sec. 11-13-16 (1975).

37. Bureau of Community Planning, A Guide for County Zoning Administration in Illinois, 39 (1965), Bureau of Community Planning, A Guide for Municipal Zoning Administration in Illinois 34 (1963).

38. See note 33 supra.

39. Conn.Gen.Stat.Snn. ch. 124 sec. 8-7 (1975) Ky.Rev.Stat. secs. 100.207, 100.211 (1975).

40. Mass.Ann.Laws ch. 40A sec. 17 (1975).

41. N.Y. Town Law §264 (McKinney 1975).

42. N.Y. Gen. City Law §37 (McKinney 1975).

43. N.J.Rev.Stat. Sec. 40:55-34 (1975).

44. N.Y. Gen. Munc. Law Sec. 239-m(McKinney 1975).

45. N.J.Rev.Stat. secs. 40:55-53 and 40:55-53.1 (1975).

46. Conn.Gen.Stat.Ann. ch. 124 sec. 8-3b (1975).

47. 260 U.S. 393 (1922).

48. Id. at 413.

49. Clark & Grable, Growth Control in California: Prospects for Local Government Implementation of Timing and Sequential Control of Residential Development, 5 Pac. L.J. 570 (1974); Cutler, Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe, 1961 Wis. L. Rev. 370; Freilich, Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, 49 J. Urban L. 65 (1971).

50. Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, in Land Use Controls: Present Problems and Future Reform 213, 214, 215 (1974).

51. Cf. Sgro v. Howorth, 54 Ill.App. 2d 1, 203 N.E.2d 173 (1964) with Freilich, supra note 50 at 228.

52. Ill.Rev.Stat. ch. 24 sec. 11-13-1 et seq. (1975).

53. Note, Time Controls on Land Use: Prophylactic Law for Planners, 57 Cornell L. Rev. 827 (1972).

54. Freilich, supra note 50 at 216.

55. The ordinance requires a subdivision developer to obtain a special "residential development use permit" prior to receiving any building permit, special permit from the Board of Appeals, subdivision approval or site plan approval from the Planning Board. The standards for issuance of the special permit are based on the availability of or proximity to (1) public sanitary sewers or an approved substitute, (2) drainage facilities, (3) improved public parks or recreation facilities including public school sites, (4) state, county or town roads, and (5) firehouses. The relationship of each public facility to the proposed development is rated on a sliding point scale: the more immediate the availability or proximity of the facility to the subdivision the greater the number of points allocated, to a maximum of five per facility.

Development is permitted only when a subdivision accumulates fifteen points under this system. The capital improvements program projects sufficient public facilities to provide the needed fifteen points for all land in the town at some point during the eighteen-year life of the program. Therefore, if the capital improvements program is followed, the town will never need to deny an application for a development permit, but can merely delay the effective date of the permit until such time as the needed facilities are to be constructed.

56. See Bosselman, Can the Town of Ramapo Pass a Law to Bend the Rights of the Entire World? 1 Fla. St. L. Rev. 234 (1973).

57. N.Y. Town Law §263 (McKinney 1965).

58. Ill.Rev.Stat. ch. 24 §11-13-1 (1975).

59. Id.

60. See, e.g. Kotrich v. County of DuPage, 19 Ill. 2d 181, 166 N.E. 2d 601, appeal dismissed, 364 U.S. 475 (1960).

61. Ill. Const. Art. VII, sec. 6.

62. Ill.Rev.Stat. ch. 24 sec. 11-13-1 (1975).

63. Cain v. American National Bank and Trust Company, 26 Ill.App. 3d 574, 325 N.E. 2d 799 (1975).

64. Golden v. Planning Board, 30 N.Y. 2d at 371, 285 N.E. 2d at 297, 334 N.Y.S. 2d at 146.

65. See note 4 et seq.-- and accompanying text supra.

66. LaSalle National Bank v. City of Evanston, 57 Ill. 2d 415, 312 N.E. 2d 625 (1974); Lapkus Builders, Inc. v. City of Chicago, 30 Ill. 2d 304, 196 N.E. 2d 682 (1964).

67. Camboni's, Inc. v. DuPage County, 26 Ill. 2d 427, 187 N.E. 2d 212 (1962).

68. County of DuPage v. Henderson, 402 Ill. 179, 83 N.E. 2d 720 (1949).

69. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

70. See, e.g., Mercer Lumber Co. v. Village of Glencoe, 390 Ill. 138, 60 N.E. 2d 913 (1945).

71. Note, Phased Zoning: Regulation of the Tempo and Sequence of Land Development, 26 Stan.L.Rev. 585 (1974).

72. High Meadows Park, Inc. v. City of Aurora, 112 Ill.App. 2d 220, 250 N.E. 2d 517 (1969).

73. Moeller v. City of Moline, 50 Ill.App. 2d 379, 200 N.E. 2d 93 (1964).

74. This was done under the Ramapo Ordinance.

75. See Note, supra note 71 at 585, 598, 599.

76. U.S. Const. 14th Amendment; Illinois Constitution Art. 1, sec. 2 (1970).

77. Harting v. Village of Skokie, 22 Ill. 2d 485, 177 N.E. 2d 328 (1961).

78. See, e.g., Forestview Homeowners Association v. County of Cook, 18 Ill.App. 3d 230, 309 N.E. 2d 763 (1974).

79. Lamm & Davison, The Legal Control of Population Growth and Distribution in a Quality Environment, 49 Denver L.J. 413 (1972).

80. See Note, supra note 71 at 859.

81. See Note, supra note 79 at 423.

82. Concord Township Appeal, 439 Pa. 466, 473, 268 A. 2d 765, 768 (1970).

83. U.S. Constitution, 5th Amendment.

84. Chicago, B & O R.R. v. Chicago, 166 U.S. 276 (1897).

85. Michelman, Property, Utility and Furness: Comments on the Ethics of Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165 (1967).

86. Bauden, Article XXVIII--Opening the Door to Open Space Control, 1 Pac. L.J. 461, 490 (1970).

87. Note, supra note 71 at 603.

88. These uses include: (1) broad agricultural uses including orchards, truck gardens, keeping, breeding and raising of fowl, raising, keeping and breeding of farm animals excluding hogs; (2) keeping, breeding and raising of rabbits, foxes, minks, rodents, primates and other small fur-bearing animals for any commercial or laboratory purposes; (3) churches and similar places of worship, Sunday school buildings, parish houses and rectories; (4) libraries, museums and

public art galleries; (5) public parks and playgrounds; (6) public utility rights-of-way and lines; (7) railroads and public utility rights-of-way and lines; (8) schools of general instruction; (9) commercial forestry; and (10) nursery schools. In addition to these, the following uses remain by special permit (special or conditional use): (1) cemeteries; (2) airports and heliports; (3) recreational facilities, such as golf courses, tennis, swimming clubs, community theaters; (4) reservoirs, water towers and water tanks owned by a public utility, located above ground; (5) telephone exchanges; (6) public and private hospitals and sanatoriums for general medical care; (7) nursing homes and homes for the aged; (8) sand pits, gravel pits, removal of topsoil and removal of other natural minerals; (9) camp or summer colonies; and (10) day camps.

89. A final constitution objection is the assertion that timed development control ordinances violate the "right to travel." See discussion infra.

90. 16. Ill.App. 2d 555, 149 N.E. 2d 344 (1958).

91. Id. at 559.

92. 3 Ill.App. 3d 996, 279 N.E. 2d 402 (1972).

93. 19 Ill.App. 3d 30, 311 N.E. 2d 325 (1974).

94. See, e.g., Ill.Rev.Stat. ch. 24 sec. 11-13-14 (1975).

95. 285 N.E. 2d 291, 334 NYS 2d 138 (1972).

96. See note 55 and accompanying text supra.

97. 285 N.E. 2d at 302, 334 NYS 2d at 152.

98. The court also pointed out that the landowner's alleged loss is mitigated by the ordinances provision for a reduction in tax assessment and for voluntary construction of necessary facilitiies by the developer. Id at 303-305, 334 N.Y.S. 2d at 154-156.

99. 375 F.Supp. 574 (N.D. Cal. 1974) reversed 522 F. 2d 897 (10th Cir. 1975).

100. The "growth policy" was enacted in response to Petaluma's drastic population increase between 1960 and 1970, during which time the city's population nearly doubled.

101. 375 F. Supp. at 577.

102. 415 U.S. 250 (1974).

103. 375 F. Supp. at 581.

104. Id. at 582.

105. 522 F. 2d 897 (10th Cir. 1975).

106. 1st Year Report, The Legal Framework: Lake Michigan and Its Shore (1975).

107. Id. at V-1 et seq.

108. Id. at 111-65 et seq.

109. See, e.g., Moynihan, Introduction to the Law of Real Property (1963).

110. There may be situations in which the acquisition of the ownership of particular parcels of property lying in the Coastal Zone may be desirable and feasible. But our concern here is with problems and issues of general applicability to the Coastal Zone.

111. The term is hopelessly imprecise. Technically speaking, a fee interest is that interest in real property none greater than which will be recognized or allowed by the law. In simpler language, it is "ownership" or "full ownership." A less-than-fee interest is, therefore, something less than "full ownership." But that term hides important distinctions. There are several ways in which an interest in real property can be "less-than-fee":

    1. An interest may be "full ownership" but not be of indefinite duration, such as a life estate or a term of years. Life estate and leasehold interests come to an end at some point in time.

    2. An interest may be "full ownership" but not be one entitling the holder to exercise ownership--exclusive possession--until some time in the future; or

    3. An interest may be non-possessory (and may never become possessory) but merely involve a right to use or control the use of the land of another. These interest include easements, licenses, profits-a-prendre, negative easements, restrictive covenants, liens and encumbrances.

112. St. Louis Bridge Co. v. Curtis, 103 Ill. 410 (1882).

113. In St. Louis Bridge Co. v. Curtis, the court made specific reference to rights-of-way. Our survey of the law indicated that the great majority of easement cases involve rights-of-way.

114. See, e.g., Transcontinental Co. v. Emmerson, 298 Ill., 394 131 N.E. 645 (1921).

115. 116 Ill. 11, 4 N.E. 356 (1886).

116. 116 Ill. at 19.

117. Goodwillie Co. v. Commonwealth Electrict Co., 241 Ill. 42, 89 N.E. 272 (1909).

118. City of Berwyn v. Berglund, 255 Ill. 498 99 N.E. 705 (1912).

119. Transcontinental Co. v. Emmerson, 298 Ill. 394, 131 N.E. 645 (1924).

120. See Seaway Company v. Attorney General, 375 SW2d 923 (Tex. App. 1964); and Gion v. City of Santa Cruz, Dietz v. King. 2 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P2d 50 (1970). State ex rel Thornton v. Hay, 462 P2d 671 (Ore. 1969) rejects the easement analysis but not because an easement could not be said to have existed. Rather the Court was there concerned with what it felt was a better basis for holding that beaches in Oregon were held subject to a right in the public for recreational purposes.

121. Cf. In Re Opinion of the Justices, 313 NE 2d 561 (Mass., 1974).

122. Such services might reduce the "cash" cost of an easement.

123. See, comment to Preserve Open Space Land, 1 Pac. L. J. 730 (1974).

124. Id. at 736.

125. A cogent argument for a legislative bailout of the problem of the application of doctrines of law that are centures old was made by Professor Costonis in Space Adrift.

126. For these purposes a writing may include a grant or instrument expressly creating an easement, Forbes v. Balenseifer, 74 Ill. 183 (1874); a deed containing a reservation of an easement, Messenger v. Ritz, 345 Ill. 433 178 N.E. 28 (1931); a deed setting forth a covenant, The Fair v. Evergreen Park Shopping Plaza, 4 Ill.App. 2d 454 124 N.E. 2d 649 (1955); or by a general plan for the benefit of several lots, usually, but not necessarily, involving a subdivision, Taubert v. Fluegal, 122 Ill.App. 2d, 298 258 N.E. 2d 586 (1970).

127. The doctrine of implication means, in effect, that based on the facts, it can be strongly presumed that an easement was intended to be created. Partee v. Pietrobon, 10 Ill. 2d 248, 139 N.E. 2d 750 (1957).

128. See Mueller v. Keller, 18 Ill. 2d 334 164 N.E. 2d 28 (1960). Prescription means the process by which, through continued exercise of the rights for twenty years notwithstanding or adverse to the intention of the landowner, the easement becomes established upon the lapse of twenty years. Ill.Rev.Stat. ch. 83 §1.

129. The question here is the acquisition of easements in a programmatic way. The vagaries of implication and prescription would be inconsistent with a systematic approach to the acquisition of easements.

130. Comment, supra note 123 at 736.

131. Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42, 89 N.E. 272 (1909).

132. Id.

133. Id.

134. Id.

135. Id.

136. The form of the grant was a contract which operated as a reservation of an easement in a series of deeds.

137. 241 Ill. at 50-51.

138. Id.

139. The court held that the acts of the parties established that more than one track could be laid. The evidence showed that more than one track had even laid and used for nearly 40 years.

140. The court held that whether or not such a right existed, it had been abandoned.

141. The evidence was less than clear on the point, but the court held that nighttime-only usage was not clearly established and therefore held that use could be made at any hour. The practical implications of all of this are enormous of course. If use of the track could have been restricted to nighttime usage, then the use of the burdened land during daylight hours would have been significantly enhanced or improved.

142. The court held that the easement could not be so used, with disastrous consequences for the Electric Co. The company had built an electric generating plant on property only some of which was benefitted by the easement. The court further held that the plant was an integrated, single facility, and consequently, in effect enjoined the Electric Co. from using the easement (i.e. the railroad track) for the benefit of the plant until such time as the plant could be "rearranged." The practical effect of all of this was that the Electric Co. would be forced to make a deal--pay off the plaintiff, Goodwillie, in other words, and an expensive piece of business, no doubt for Electric and profitable for Goodwillie.

143. A phrase such as "in perpetuity" ought to suffice.

144. A statute, declaring that grants of easement for public beach recreational purposes should be liberally construed so that the public interest in the Illinois Coastal Zone shall be preserved and enhanced, would do wonders. More generally, as pointed out in the First Year Report, the rather obvious, but frequently overlooked fact that the actions--or non-actions--of the legislature have a profound impact on the way Illinois courts look at things. The reverse proposition is equally true, but given the character of Illinois jurisprudence, we suspect that, more often than not, it is for the legislature to take the first step.

145. See, e.g., Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42, 89 N.E. 272 (1909).

146. Garrison v. Rudd, 19 Ill. 448 (1858); Waller v. Hildebrecht, 295 Ill. 116, 128 N.E. 807 (1920).

147. Allendorf v. Daily, 6 Ill. 2d 577, 129 N.E. 2d 673 (1955).

148. An interesting question is posed if two public authorities join together to acquire an easement, one of the authorities holding benefitted land, the other not. It would seem that as to the authority holding benefitted land that the easement is appurtenant, and became of the constructional preference for easements appurtenant, Allendorf v. Daily, 6 Ill. 2d 577, 129 N.E. 2d 673 (1955), then that characterization ought to control. Of course if the easement is conveyed without conveying the land benefitted at the same time, then one supposes that the easement, in the hands of the grantee, is only in gross.

149. See note and accompanying text infra, at 151.

150. See Goodwillie Co. v. Commonwealth, Electric Co., 241 Ill. 42, 89 N.E. 272 (1909).

151. See, e.g. Chicago Title & Trust Co. v. Wabash-Randolph Corp. 384 Ill. 78, 51 N.E. 2d 132 (1943).

152. The requisite number of years is twenty. Ill.Rev.Stat. ch. 83 §1. Cf. Nelson v. Randolph, 222 Ill. 531 78 N.E. 914 (1906).

153. See note 135 supra.

154. A possibility of reverter is a right in the grantor of an interest in land, which is the subject to the happening of a specific event at some point in time (a condition subsequent) after the grant of the interest, to reenter the land and terminate the interest created upon the happening of the specified event.

155. Ill.Rev.Stat. ch. 30 §§37b et seq.

156. Deverick v. Bline, 404 Ill. 302 89 N.E. 2d 43 (1950).

157. Ill.Rev.Stat. ch. 30 §37e.

158. A reversion is an automatic revesting of the title in the maker of an interest in land, also subject to some condition subsequent, but upon the happening of the condition the interest, as noted, automatically terminates. In the case of reverters, the holder of that right must take some action. It is that right of action only that has been severely limited by the statute. S.H.A. c. 30 §§376 et seq.

159. See, e.g. Horween v. Dubner, 68 Ill.App. 2d 309 216 N.E. 2d 288 (1965).

160. Kingsley v. Roeder, 2 Ill. 2d 131, 117 N.E. 2d 82 (1954).

161. Unless the easement created in each case is an easement in gross only in which event B-1 could enforce the easement against no one.

162. See, e.g. Kuecken v. Voltz, 110 Ill. 264 (1884).

163. 241 Ill. 42, 89 N.E. 272 (1909).

164. See notes 137 and 138 and accompanying text supra.

165. See, e.g. Baldwin v. Sager, 70 Ill. 503 (1873); Belusko v. Phillips Petroleum Co., 198 F. Supp. 140 (S. D. Ill. 1961), affirmed, 308 F 2d 832 (7th Cir. 1962).

166. See, e.g., Wiegman v. Kusel, 270 Ill. 520, 110 N.E. 884 (1916).

167. Ill.Rev.Stat. ch. 47 sec. 1 (1975).

168. Comment, supra note at 741.

169. Id.

170. Id. at 745.

171. Id.

172. See California Legislature, Joint Comm. on Open Space Land, Final Report 33 (1970).

173. 42 U.S.C. §§1500-1500d-1 (Supp. 1975).

174. 24 C.F.R. §§541.1-541.20 (1975).

175. Punzak v. DeLano, 11 Ill. 2d 117, 142 N.E. 2d 64 (1957).

176. See, e.g., VanSant v. Rose, 260 Ill. 401 103 N.E. 194 (1913).

177. Eckhart v. Irons, 128 Ill. 568, 20 N.E. 687 (1889).

178. Crest Commercial, Inc. v. Union Hall, Inc., 104 Ill.App. 2d 110, 243 N.E. 2d 652 (1968).

179. Dolan v. Brown, 328 Ill. 413, 159 N.E. 794 (1930).

180. A. S. & W. Club of Waukegan v. Drobnick, 26 Ill. 2d 521, 187 N.E. 2d 247 (1963).

181. Subdivision regulations will establish construction costs and specify building materials, but only in the case of streets, sidewalks, curbs, gutters, sewers and the like. These matters can be considered under PUD regulations. The essence of the PUD device is that developers and planners make a deal, the developer not being coerced since he could develop conventionally rather than under the PUD regulations. In theory, therefore, any questions is fair game for negotiation.

182. The notable exception, of course, is Houston, Texas, a city with no zoning.

183. See Chicago Sun-Times, Wednesday, June 18, 1975 at p. 46, as cited in "Lake Michigan" at p. III-65, n. 222. Under Illinois law, such restrictions may be acquired for any reasonable purposes. Crest Commercial, Inc. v. Union Hall, Inc., 104 Ill.App. 2d 110, 243 N.E. 2d 652 (1968).

184. The owner of the burdened land could conceivably be allowed to engage in "natural" uses of his land, such as farming or other agricultural operations. Cf. Just v. Marionette Co., 56 Wis. 2d 7, 201 NW 2d, 761, (1972). But the owner would not be allowed to erect structures on the burdened land whether in aid of farming or not, and would not be allowed radically to alter the natural terrain by strip mining, quarrying or other similar operations.

185. There may be situations where an absolute prohibition against development is not necessary. For example, the protection of scenic or open space values can be satisfactorily provided for where unobstrusive, low-density development is allowed. However, it may be impossible to identify specifically what development ought to be allowed in any given case so the holder of the restriction acquires the right, in effect, to approve or disapprove proposed development as the holder, in its discretion, shall determine.

186. There may be situations where some specific types of allowable development can be predetermined.

187. This kind of restriction would relate primarily to the preservation of structures of historic or architectural significance. Cf. S.H.A. c. 24 §11-48.2-1A. It should be noted that this kind of restriction breaks down into the three classificiations immediately preceeding.

188. See, e.g., Bosselman, Callies and Banta, The Taking Issue, Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv.R.Rev. 574 (1972).

189. 16 U.S.C.A. §§1451-64 (1975 Supp.).

190. 16 U.S.C.A. §1451. (1975 Supp.).

191. See, e.g. Wiegman v. Kusel, 270 Ill. 520, 110 N.E. 884 (1915).

192. Eckhart v. Irons, 128 Ill. 568, 20 N.E. 687 (1889).

193. Labadie v. Morris, 303 Ill. 321, 135 N.E. 733 (1922).

194. Leverich v. Roy, 338 Ill.App. 248, 87 N.E. 2d 266 (1949).

195. Brandenburg v. Country Club Bldg. Corp., 332 Ill. 136, 163 N.E. 440 (1928).

196. Gordon v. Caldwell, 235 Ill.App. 170 (1924).

197. A similar dilemma confronts the draftsmen of zoning ordinances that specify detailed or precise permitted land uses in a particular zon-

ing district. The courts have been known to "read in" or "read out" permitted land uses. See, e.g., Western Theological Seminary v. City of Evanston, 325 Ill. 511, 156 N.E. 778 (1927).

198. Metcoff v. Dahlquist, 252 Ill.App. 222 (1929).

199. Which predicates identifying a dominant or benefitted estate.

200. This is not to say that it could not be used. For example, the appropriate authority could acquire all of the necessary shore land, in fee, record an appropriate plat or declaration of restrictions and then convey all of the land retaining perhaps, one small parcel so that it could enforce the restrictions, as an owner of benefitted land. Cash flow and other considerations do not suggest that this approach would be allowed.

201. See note 146 and accompanying text supra.

202. See note 150 and accompanying text supra.

203. Hurt v. Hejhal, 259 Ill.App. 221 (1930).

204. 338 Ill. 508, 170 N.E. 669 (1930).

205. Watts v. Fritz, 29 Ill. 2d 517, 194 N.E. 2d 276 (1963).

206. Exchange National Bank of Chicago v. City of Des Plaines 127 Ill.App. 2d 122, 272 N.E. 2d 48 (1970).

207. Housing Authority of Gallatin County v. Church of God, 401 Ill. 100, 81 N.E. 2d 500 (1948).

208. Paschen v. Pashkow, 63 Ill.App. 2d 56, 211 N.E. 2d 576 (1965).

209. 16 U.S.C.A. §1456 (1975 Supp.).

210. See note 132 and accompanying text supra.

211. See note 127 and accompanying text supra.

212. See note 167 and accompanying text supra.

213. Ill.Rev.Stat. ch. 24 sec. 11-48.2-1A(2) (1975).

214. Id.

215. The definition of "preservation restriction" is also part of the Municipal Code and as such may be unavailable to non-municipalities.

But through the use of intergovernmental cooperation, the availability can conceivably be extended.

216. Ill.Rev.Stat. ch. 24 sec. 11-48.1-2 (1975).

217. Costonis, Space Adrift: Saving Urban Landmarks Through the Chicago Plan 156 (1974).

218. 31 Wis. 2d 256, 142 N.W. 2d 793 (1966).

219. Richley v. Craw, 43 Ohio Misc. 94, 334 N.E. 2d 542 (1975).

220. Hardesky v. State Roads Commission, 276 Md. 25, 343 A2d 884 (1975).

221. Finks v. Maine State Highway Commission, 328 A2d 791 (Sup.Ct.Me. 1974).

222. 370 Ill. 356, 19 N.E. 2d 193 (1939).

223. Id. at 368.

224. Comment, A Model Ordinance to Control Urban Noise Through Zoning Performance Standards, * Harv. J. Legis. 608 (1971).

225. Ill.Rev.Stat. ch. 24 sec. 11-13-1 (1975).

226. McDougal, Performance Standards: A Viable Alternative to Euclidean Zoning? 47 Tulane L. Rev. 255, 261 (1973).

227. See, Comment, supra note 224 at 614.

228. McDougal, supra note 226 at 265.

229. See, e.g., Chicago Title and Trust Co. v. City of Chicago, 130 Ill. App. 2d 45, 264 N.E. 2d 730 (1970).

230. McDougal, Supra note 226 at 264.

231. Id. at 266.

232. Mandelker, The Zoning Dilemma, 121-122 (1971).

233. Id, at 436.

235. This refers to applications for other than "minor" development, e.g., construction of a single family home.

236. Singer, supra note 233 at 437.

237. Kozesnik v. Montgomery Township, 24 N.J. 154, 134 A. 2d 260 (1957).

238. Planning Advisory Service Report Nos. 307, 308, Performance Controls for Sensitive Lands, 3, 4 (1975) (hereinafter cited as ASPO).

239. Id. at 5.

240. Ill.Rev.Stat. ch. 24 sec. 11-13-1 (1975).

241. 7 Ill. 2d 313 (1955).

242. Id. at 324.

243. International Harvestor Co. v. Zoning Bd., 43 Ill.App. 2d 440, 193 N.E. 2d 597 (1963).

244. See note 238 supra.

245. ASPO at 4.

246. ASPO at 96.

247. ASPO at 102.

CHAPTER VII
ZONING OF LAKE MICHIGAN--TIME SHARING AND CONTROL OF WATER USE

While the foregoing sections focused on the various techniques that are, or may be employed by coastal zone municipalities to protect their critical land use area, these techniques do not regulate the use of Lake Michigan directly. Rather, they ignore the very real problems that face the Coastal Zone Management Program in attempting to make the Lake available for all potential users. This section is primarily concerned with focusing upon the various recreational uses of Lake Michigan and in resolving the conflicts which undoubtedly will arise when various groups of potential users are unable to share the use of the Lake.[1] This is of particular concern for recreational conflicts have arisen in recent years as the increasing popularity of water-based recreation, especially boating, threatens to outgrow the available resources of Lake Michigan. The supply of water surface in the Lake, although vast, is fairly limited when near shore line activities are contemplated and ultimately may be unable to keep pace with an ever increasing demand by the public.

As has been pointed out previously, Lake Michigan is held in trust for the people of the State of Illinois.[2] Therefore, it is incumbent upon the State, and of particular concern to the Coastal Zone Management Program to plan and provide for the compatible use of Lake Michigan. A possible method to control conflicts that arise between lake users is zoning. Like traditional zoning,[3] this would involve a determination of the best uses for individual portions of the lakefront and their adjoining water, and regulating such zones accordingly.

1. Existing Illinois Law

The public has the right to engage in water recreation activities if there is no unreasonable interference with the rights of others. In order to assure that such activities do not impose upon the activities of other water users, limited legislation has been enacted in Illinois.

The power to regulate recreational activities on the waters of the State rests with the General Assembly. They have delegated this power, in part, to water authorities which may be created as a municipal corporation pursuant to a referendum.[4] Once incorporated, water authorities are authorized "to regulate or prohibit fishing, boating, swimming or other sporting activities,"[5] within their jurisdiction.

Particular activities, particularly boating, have been subject to regulation by the Department of Conservation.[6] Most interestingly, for

our purposes, is the power given the Department and municipalities to designate areas for bathing, fishing, swimming or for other activities and to prohibit the use of motor boats within these areas.[7] The use of such restricted areas are the crux of lake zoning.

2. The Use and Implementation of Lake Zoning

As noted above, the increasing use of that limited supply of surface water inevitably causes conflicts due to crowding conditions. The traditional uses (e.g., fishing and swimming) are in competition for space with the "newer" uses (e.g., waterskiing and speed boating).

Conflicts can also exist although many offshore areas of Lake Michigan are not considered to be crowded. Many water recreation activities are unable to use the same area regardless of the numbers involved. Thus, obviously, boating and swimming conflict. There is also the frequent complaint of fishermen who claim skiers cut their lines, disturb the boat by excessive waves, and even spray them with water. The fisherman and the speed boat enthusiast cannot coexist within the same proximate area. These activities are incompatible and can conflict with one another, even without crowded conditions.

In addition to the perhaps minor irritation that conflicts cause on lake surfaces, there is the more serious issue of increasing accidents and even death. With more and more users present on lakes, there is obviously a greater chance for more accidents to occur. But whether this is directly due to the crowded conditions, incompatibility, or is just a matter of more negligence is hard to determine.

In the past it was fishing and swimming that were the obvious uses of the Lake, but now, in addition, there coexist sailboats, skin divers, scuba divers, house boats, speed boats, pontoon boats and skiing. With greater leisure time, the use and more numerous recreation vehicles must also be considered as a factor in the growth of water recreation conflicts along with better road systems which make areas more accessible to the general public putting even more pressure on the limited supply of near shore lake surface.

The synthesis of these leisure time phenomena yields the conclusion that ultimately near shore Lake Michigan will not meet the demand for its use. Predictions for the future demonstrate that water recreation demand will continue to grow and, therefore, the need for water use controls will be maximized. The function of lake zoning is to minimize the inevitable conflicts and it has as its two-fold objectives maximizing the recreation potential of a lake and minimizing its hazards. These objectives are accomplished by various applications of traditional land use control powers to the water use milieu.

When controlling a lake surface by traditional zoning techniques, there are several methods that can be applied with the same objectives. In order to determine which method would be best, various factors must be considered. The first step in this determination is to make a judgment about the relative desirability of the various recreation activities found on the near shore Lake--to prioritize water use. There are numerous factors involved that must be considered in order to properly make this decision, including: physical and ecological aspects of the Lake; space requirements for the different uses; effects of each activity on the Lake, past patterns of use, shoreline development, and aesthetic considerations. Thus, we turn our attention from land use impacts on the water to water use impacts themselves.

One such technique that has been evaluated is "area zoning." On the premise that activities cannot conflict if physically separated from one another--a typical "euclidian zoning" technique--individual activities have a specified area or zone designated for that use only. This type of regulation is employed by the Department of Conservation. A simplistic example of area zoning would be for the shallow shorelines where firm bottoms exist to be designated as swimming areas only. The next zone--just outside of the swimming area--would be reserved for fishing. The center of the lake would be the third zone, used exclusively for high speed boating and water-skiing.

Much more involved variations of area zoning are also possible. The Wisconsin Department of Natural Resources recommended a variation of area zoning utilizing a shoreline activity zone 200 feet wide. This is the zone receiving the most intensive use including swimming, anchoring of boats, shore and shallow water fishing, wildlife observation, and duck hunting. It is also the nesting, feeding, and nursery area for fish and waterfowl. Boats are typically not allowed in this area but to enter or leave it for docking, and then only at a dead slow or no-wake speed. Faster activities are restricted to areas outside of this shoreline activity zone.

Area zoning works very well on some lakes but it is not the complete answer to water recreation problems, especially on Lake Michigan where the shoreline is so vast that it may be inequitable to prohibit <u>all</u> boating activity in this area.

The use of time zoning has been a second method utilized to aid in the reduction of lake conflicts. It is obvious that conflicting users cannot disturb one another if their activities occur at different times. Time zoning uses this basic idea and allocates specified hours of the day for one activity, and a different portion of the day for a conflicting use.

The most prevalent use of time zoning involves fishing and water-skiing. These two activities frequently conflict for the use of a lake's

surface, but they can be accomodated by assigning to each that period of the day best suited for that particular use. For example, water-skiing as a fair weather sport most enjoyed during the warm sunny hours of the day--is assigned those hours. Thus, many lakes have established the hours of 9:00 a.m. to 6:00 p.m. as the sole designated times for water-skiing on the lake.

Though fisherman are not lawfully limited to specific hours of the day as skiers, they are encourage to utilize the early morning and evening hours of the day. In addition, during days of bad weather, fishermen are not limited to specific areas, as with area zoning, but rather are free to fish anywhere and anytime without conflict with the fair weather users.

Time zoning is not without its drawbacks. First is the question of inadequate resource use. Because of the strict adherence to time, there may often not be another waiting to recreate at the end of the previous user's time period. This could allow a lake resource to go unused and its full recreation potential would not be realized. The inflexibility of time zoning is also criticized by some users. Skiers particularly complain because it does not conforn to leisure time availability. For example, a person working a normal business day would find it very difficult to be able to ski from Monday to Friday, limiting his skiing hours to two days per week. Thus, a further method must be considered.

A third type of control that will be used more intensively in the future is density or impact zoning. This method involves determining the carrying capacity of the Lake and limiting the number of users accordingly. This type of control is used in other recreation activities (such as issuing a limited number of deer hunting licenses or limiting the number of canoes on popular rivers) and could be able to be utilized for zoning and control of Lake Michigan.

A working definition of carrying capacity states:

> . . . carrying capacity is the number of user-unit use periods that the recreation site can provide . . . without permanent biological or physical deterioration of the site's ability to support recreation or appreciable impairment of the recreational experience.

Carrying capacity is a very complex concept that involves more than trying to indicate an area requirement for water based recreation activities. As one critic writes: "it consists of five elements interacting with each other. These elements are: 1) administration, 2) biological, 3) physical, 4) social and 5) temporal."

To discuss the concept of carrying capacity in detail is beyond the scope of this Chapter. It should be noted that the basic concept is complex. The usefulness of this concept for the management of Lake Michigan use has not been realized yet, but it is becoming more popular and widely recognized as a key to solving future conflicts.

Speed zones are often used in connection with other zoning methods. Areas that have been reserved for fishing or swimming for example, also incorporate a 5 mile per hour or no-wake limitation. The no-wake designation is used to aid in enforcement of the regulation due to the difficulty in measuring or estimating the speed of a boat. The definition of no-wake simply means that watercraft are limited to moving at a speed that will produce no visible wake.

Speed zoning is used for reasons other than reducing conflicts, such as to protect shorelines from erosion problems; to protect docked boats from damage; and to protect fish spawning areas and wildlife nesting areas.

3. Protective Space Zoning

A further type of zoning that involves the speed of the watercraft is termed "protective space zoning." This control technique is primarily designed to minimize conflict between fast moving and slow moving vehicles, without unduly restricting either one. It attempts to do this by providing a protective barrier of space around the slow boat in much the same way that aircraft control provides safety space around aircraft.

The presence of this protective zone keeps inconsiderate power boaters away from others that cannot move out of their way safely and quickly. This would include anchored fishermen, swimmers, divers, sailboats, docks, and rafts. Regulations commonly recommend that a distance such as 100 or 200 feet should be maintained. Any boat approaching closer than the prescribed distance is required to slow to 5 miles per hour or a no-wake speed until it has cleared the protective space area.

Other forms of regulating Lake Michigan and other lakes have been suggested but as yet have not been seriously attempted. Some examples of these untested ideas are changing the current pattern of weekend use, variations on the time zoning method, and a reservation type system.

It is reported that 75% of the use of water resources for recreation occurs on weekends and holidays. This concentration of use creates overcrowding and a much greater risk of conflicts. Suggestions such as staggering the work week so everyone does not have the same two days off every week seem extreme but in the near future it may become a necessity. Another idea has been to allow water-skiing only every other weekend.

This would hopefully reduce conflicts in the same manner that time zoning on a day to day basis does.

A similar idea using the time zoning concept proposes that activities have specified days of the week; for example, water-skiing might be limited to a Monday-Wednesday-Friday schedule. This would replace the hourly system.

A reservation system has been suggested as another alternative to be used in conjunction with area zoning. This idea has been tried on other recreation activities with a good degree of success and could be easily adapted to water recreation. Camping particularly has found it a necessity to create a reservation system and reports have been favorable. Lake activities such as fishing, swimming, or water-skiing, could have permits issued for specific days of the week or even hours of a day for certain portions of the lake. In this manner, the Lake will be sure to use it's full recreation potential. With this system, the crowded weekends experienced so frequently would no longer have to be tolerated. Lake users could be spaced for a more even distribution of weekend and weekday use resulting in a more enjoyable and less conflicting recreational experience.

4. Conclusion

Although these approaches may be met with skepticism due to the size of Lake Michigan, the implementation of zoning schemes is important for the future. Even the Tennessee Valley Authority, which has jurisdiction over vast water areas, establishes boundaries or harbor limits for water based developments which deal in the servicing, docking and mooring of water craft. Further, they realize the necessity of ultimately implementing water surface zoning.

While immediate utilization of a water zoning system may not be beneficial to the people of Illinois, subsequent studies undertaken under the auspices of the Coastal Zone Management Program should review the utility of such a program. For as the population of the State steadily increases, the waters of Lake Michigan do not increase concomitantly and provision for various users must be made before a crisis reaches the lakefront.

FOOTNOTES

1. This section is basically derived from Meyer, Lake Zoning: A Method of Controlling User Conflicts on Michigan's Inland Lakes (unpublished master's thesis 1974). It should further be noted that the United States Coast Guard has, under its statutory authority, significant potential powers of implementation of in-water zoning controls.

2. Ill.Rev.Stat. ch. 19 sec. 71 (1975). The Department of Transportation is given the duty to implement this public trust. Ill.Rev.Stat. ch. 19 sec. 54 (1975).

3. See, e.g., Gable v. Village of Hinsdale, 87 Ill.App. 2d 123, 230 N.E. 2d 706 (1967).

4. Ill.Rev.Stat. ch. 111 2/3 §223 (1975).

5. Ill.Rev.Stat. ch. 111 2/3 §241 (1975).

6. Ill.Rev.Stat. ch. 95 1/2 sec. 311-1 et seq. (1975).

7. Ill.Rev.Stat. ch. 95 1/2 secs. 315-7-315-7.5 (1975).

CHAPTER VIII
FINANCING TECHNIQUES:
STATE AND LOCAL ALTERNATIVES--A STUDY IN COMPLEXITY

This Chapter is intended as a broad survey of the framework for financing the Coastal Zone Management Program at the state and local levels of government. Any primer or survey of the various financing techniques that may be employed to finance aspects of the Illinois Coastal Zone Management Program must begin with a caveat: most of the financing methods that will be discussed will require enabling legislation at either the state or local level. Thus, while some proposals may seem preferable because they combine revenue features with indirect regulatory control, they may be so far-reaching, and might entail such a change in state or local taxation patterns that they may not be realistic in a practical or political sense at the present time. Therefore, a number of techniques, some less controversial than others will also be reviewed in this Chapter and that following dealing with special assessments for shore protection measures.

1. The Illinois Constitutional Framework--Revenue Techniques

As any financing legislation recommended by the Coastal Zone Management Program must necessarily avoid state constitutional prohibitions, the limitations embodied in the state's 1970 Constitution must first be reviewed. Although the state does not derive its basic taxing power from the Illinois Constitution (since states have the inherent power to levy taxes as an integral part of their sovereignty), it must abide by the restrictions placed on the taxing power by the Illinois and federal Constitutions.[1]

The United States Constitution does not present a formidable barrier to the Illinois' taxing power. Challenges to revenue measures based on the Federal Constitution generally allege either a violation of the due process or equal protection clauses of the Fourteenth Amendment[2]--that is, that a specific taxing measure is unreasonable and arbitrary because it arbitrarily singles out one class of persons or property to be taxed. However, and surprisingly, the courts have generally upheld such legislation despite this charge, finding that, while the State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary, the equal protection and due process clauses impose no iron rule of equality, but rather, allow the flexibility and variety that is appropriate to all reasonable schemes of taxation.[3]

At the state level, however, more specific limitations exist. In Illinois, the power of taxation is vested in the legislative department,

the General Assembly, which possesses plenary power over the subject of taxation subject to constitutional restrictions.[4]

The Illinois Constitution of 1970 places a number of limitations upon the state's taxing power. The Constitution differentiates between property and non-property taxes. As to non-property taxes, if any law classifies the subjects or objects of taxes or fees, these classes must be reasonable and the subjects and objects within each class shall be taxed uniformly.[5] The "reasonable classification and uniformity" clauses have given rise to a considerable amount of litigation under the Constitutions of 1870 and 1970.[6] Yet, the Illinois courts have been consistent in finding that the legislature created a reasonable classification--a liberal construction generally in favor of the classification.

In Titus v. The Texas Co.,[7] the Supreme Court of Illinois articulated the test used to determine whether a classification for the purpose of taxation is reasonable. The court stated that "[a] classification must be upheld if any state of facts reasonably can be conceived that would sustain it."[8] This test can fairly easily be met for, in effect, the court is accepting the judgment of the legislature and only a classification that is totally arbitrary will be struck down. Once a classification is upheld, the uniformity clause merely requires uniformity of taxation within the class--the burden of taxation must achieve a reasonable degree of uniformity rather than any absolute mathematical equality.[9] Thus, the constitutional burden is satisfied if it is evident that the intent of the taxing body was to adjust the tax burden with such "a reasonable degree of uniformity."[10]

Taxation on real property is also authorized by the Constitution with the similar requirement that such taxes must be levied uniformly by valuation.[11] There is an exception to this rule that allows classifications of real property for purposes of taxation by counties with a population of more than 200,000[12]--once again, such classifications are mandated to be reasonable and uniform within each class.[13]

A state income tax is authorized under Article IX, Section 3 of the 1970 Constitution; however, the State is prohibited from taxing income at a graduated rate. Therefore, proposed tax measures that would tax the profits made from excessive land speculation, for example, may be unconstitutional.[14]

State debt is limited by constitutional Article IX, Section 9. State debt is defined as that indebtedness secured by the full faith and credit of the state; required to be repaid from tax revenue and incurred by the state, any department, authority, public corporation or quasi-public corporation of the state, any state college or university, or any other public agency created by the state; but not indebtedness of units of local government, or school districts.[15] For Program pur-

poses, it is critical to note that the authorization of a taxing district by the General Assembly does not necessarily make the governing body of such district a state agency if that district's actual existence is dependent upon referendum--a vote of the district's electorate.[16] Article IX, Section 9 does not set a debt limitation in numerical terms; instead, it provides that state debt for any specific purpose may be incurred in such amount as is provided by a law passed by a vote of three-fifths of the General Assembly or approved by a majority of the electors.

Finally, although not relevant to the Program, the General Assembly is enabled to classify personal property for purposes of taxation by valuation.[17] The General Assembly is required to abolish all ad valorem personal property taxes by January 1, 1979, and is forbidden from recapturing the lost revenue by imposing a statewide ad valorem tax on real estate.[18]

2. Local Units of Government--Revenue

The 1970 Constitution also places limitations upon the revenue powers of local governments. As noted above, debts incurred by units of local government are not included in any determination of the state debt. If the unit of local government is a home rule unit,[19] it is expressly authorized to tax and incur debt.[20] Even this power is limited under two distinct circumstances: (1) a home rule unit may not incur debt payable from ad valorem property tax receipts maturing more than forty years from the time it is incurred;[21] nor (2) may it impose taxes upon or measured by income or earnings or upon occupations except as the General Assembly allows.[22] Furthermore, the General Assembly by a law passed by a vote of three-fifths of each house may deny or limit a home rule unit's power to tax[23] except in regard to making improvements by special assessment or in special service areas.[24]

The taxing powers given non-home rule units of local government are, at least on the surface, far more limited than those of home rule units. They are given the power to make local improvements; to incur debt except as limited by law, provided that debts payable from ad valorem property tax receipts must mature within forty years from the time incurred; and to impose additional taxes in special service areas.[25] Otherwise, they may only exercise such powers as are granted them by law.[26] Traditionally, Illinois courts strictly construe local powers[27] and non-home rule municipalities have no inherent power to tax. Like other powers, the power of non-home rule units to tax remains subject to the severe restraints of Dillon's rule,[28] and may be exercised only as delegated by the General Assembly. Statutes granting municipalities the power to tax, like other taxing statutes, are strictly construed with any doubt as to the power construed against the grant.[29]

As we follow the abrupt decline in powers from home rule through non-home rule units, even greater restrictions can be found placed upon the revenue powers of special purpose units of local government--all units other than municipalities. Article VII, Section 8 provides that they shall have only the powers granted by law. Furthermore, the General Assembly is forbidden to give such units the power to incur debt payable from ad valorem property tax receipts maturing more than forty years from the time it is incurred. More importantly, no law may empower these units to make improvements by special assessments if they did not have such power on the effective date of the Constitution,[30] as discussed in the next Chapter.

Finally, neither the state nor any unit of local government may use public funds for other than public purposes. This public purpose requirement has been liberally construed in Illinois being "one within the purposes for which governments are established."[31] Revenue from taxation cannot be used to aid enterprises that are strictly private, even if the public benefits from the enterprise in a collateral way;[32] however, the rule of judicial construction favors the finding of a public purpose--especially when the public purpose is recited in the enabling legislation. If by any reasonable construction a use designated by the legislature may be regarded as public, the judgment of the legislature must prevail.[33] If the tax is for an expenditure which tends to promote the general welfare, the tax levy is proper.[34]

It is important to note that revenue measures that may be enacted to finance or assist in the implementation of the Coastal Zone Management Program should not encounter opposition as being violative of the public purpose requirement. Clearly, funds expended for the preservation and restoration of Lake Michigan, its shore and its environs--one of the state's most important natural resources--satisfies the public purpose requirement and would, in fact, be in furtherance of the public trusteeship that is the state's. Furthermore, the Illinois Constitution expressly states that:

> [t]he public policy of the state and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.[35]

Thus, it is clear that the General Assembly is empowered to enact revenue measures to implement the Coastal Zone Management Program. In an analogous situation wherein a revenue measure to provide water recreational facilities was challenged, the court held that the measure was constitutional because it served a public purpose.[36] It is axiomatic that the protection of water, without which water recreational facilities could not exist, must be a proper public purpose.

With this basic and simplistic outline of the constitutional limitations applicable to revenue measures, various financing techniques will now be surveyed. The discussion will begin with the possibility of implementing existing types of revenue measures to finance the Coastal Zone Management Program. Thereafter, alternative measures will be discussed, including both new techniques and the use of intergovernmental cooperation to enact and enforce new measures.

3. Statewide Taxation

As a simple proposition, there are no restrictions placed upon the General Assembly's authority to allocate funds being collected under existing revenue programs to finance the Coastal Zone Management Program. Such funds may be distributed to the Department of Transportation's Division of Water Resources and thereby to the Program or to another state instrumentality for Program purposes.[37]

Although there is no constitutional proscription against the imposition of ad valorem real property taxes by the state, this method of taxation was abandoned in 1932,[38] and since has been left to local governmental units. Instead, revenue from sales, use and income taxes constitute the bulk of state revenues today.

One logical piece of existing legislation could be amended in part so as to allow a portion of the monies generated at the state level to be allocated to the Coastal Zone Management Program. Section Two of the "Motor Fuel Tax Act" imposes a tax upon the privilege of operating recreational-type watercraft upon the waters of the state at a statutory rate of 7 1/2¢ per gallon for all motor fuel used.[39] The taxes generated are then deposited in the State Boating Fund to be used by the Department of Conservation to carry out the provisions of the Boat Registration and Safety Act.[40] The fund is now principally used for the construction and improvement of water recreational facilities. This legislation is clearly adaptable to the purposes of the Coastal Zone Management Program. Furthermore, a similar tax could be levied upon water vehicles that are powered by means other than gasoline; currently, for example, taxation on diesel fuel for water craft does not exist.

Along similar lines, other private enterprises that are within the coastal zone could be taxed to implement the Coastal Zone Management Program. Even if such entities are already subject to taxation, an additional tax may be imposed upon them for the purpose of financing the Program. Differential treatment for purposes of taxation can withstand constitutional attack so long as the classifications are reasonable.[41] Here, the classification would be per se reasonable because the entities subject to taxation are deriving a benefit by reason of the protection of

the coastal zone. Furthermore, such a tax would not constitute the constitutionally prohibited double taxation as that proscribed activity entails taxing twice, for the same purpose, in the same year, some but not all of the property in the territory in which the tax is imposed.[42] In this instance, the tax would be for a different purpose--one which constitutes a valid governmental purpose--therefore, constitutional objections on the basis of double taxation should not exist. This type of taxation could take the form of use or occupational taxes.[43] Actually, the types of taxes that may be authorized by the General Assembly upon entities existing in or affecting the coastal zone are not limited. Certainly coastal dependent uses now receive favored tax treatment by not, as a group, bearing their special burden of shoreline and lake water maintenances. If these taxes are to be levied on property, it should be noted that there is no specific limitation in the Illinois constitution upon the legislative authority to define real property and personal property for the purposes of the general property tax. Under universal property tax systems, such as our state's, it is well established that the legislature has broad power to define what shall be assessed as real property and what shall be assessed as personal property.[44] Innovative taxing techniques not currently employed in Illinois, and the types of bonds that may be issued at the state level will be discussed in subsequent sections of this Chapter.

4. Local Taxation

The Coastal Zone Management Act of 1972 contemplates the interaction of the state with its political subdivisions--thus, the shoreline municipalities could constitute important sources of revenue to finance the overall Program or relevant portions thereof. While the General Assembly cannot force local units to levy taxes for Program purposes, local units may wish to bear a share of the cost of the program. To obtain a measure of "sharing", for example, the state could condition the allocation of state and federal funds to finance local aspects of the Program upon the locality's willingness to generate a percentage of the cost of certain development, protection or enhancement projects, among other things.

As was previously discussed, non-home rule municipalities have no inherent power to tax--this power may be exercised only as delegated by the General Assembly. Today, real property taxation constitutes the major taxation power delegated by the legislature to local government. More than thirty-two separate types of taxing districts have been authorized by the General Assembly, and consequently thousands of taxing districts exist throughout the state.

The General Assembly empowered municipalities to levy a general municipal corporate purpose tax,[45] and also althorized these governments

to levy property taxes for some forty different purposes[46]--ranging from levies for airport purposes to levies for tuberculosis sanitariums. Some tax measures may only be employed by municipalities of a certain population;[47] some require a referendum;[48] and some of the taxes may only be levied for a maximum number of years.[49] All of the existing legislation places a limit upon the percentage of the equalized assessed value of the property in the municipality that may be taxed for such purposes.[50] Certain of these taxing measures have purposes that are very closely akin to the Coastal Zone Management Program. Thus, for example, municipalities may levy a property tax for the construction and maintenance of parks and boulevards,[51] playgrounds and recreational facilities,[52] community buildings,[53] cultural centers,[54] sewerage purposes,[55] forestry programs,[56] harbor construction,[57] and levee purposes.[58]

The General Assembly could authorize a tax to be levied on real property by those municipalities located within the coastal zone for the purpose of financing certain aspects of the program. Legislation of this type may well be appropriate under the circumstances since a major goal of the Program is for the state to work in conjunction with units of local government.[59] The legislature might authorize such shoreline municipalities to levy the tax for either a finite number of years or may extend this power of taxation indefinitely.[60] The legislation may require a referendum for the levy of the tax, but this requirement is not mandated by the state Constitution.

The only difficulty involved with the enactment of coastal zone specific legislation is that it may not be constitutionally permissible to limit the taxing power to coastal zone municipalities. While legislation is often limited to municipalities within a specific population limit,[61] if this taxing power is only given to municipalities within the coastal zone, the law may constitute impermissible special legislation--though given the special context of the coastal zone and the public trust imposed on the Lake, a basis for distinction may well exist. Special legislation are those types of laws which contain a grant of a special of exclusive privilege.[62] The test to determine if any certain legislation constitutes a special law is whether the law operates uniformly throughout the state upon all persons and localities under like circumstances.[63] If the statute operates upon a certain class, it is not void as special legislation if there is a substantial difference between the objects classified and those not so classified, as shown when that difference is evaluated with reference to the statute's objective which justifies the conferring of the specific right.[64] Thus, as there is a substantial difference between those municipalities, this type of legislation should withstand judicial attack. This is especially true since the persons residing within coastal zone areas have a greater opportunity to use the facilities and amenities offered by Lake Michigan. Furthermore, a legislative finding may be made that property values within the coastal zone are enhanced by their proximity to Lake Michigan.

Another alternative may be to draft the legislation to empower any municipality to levy a property tax for the purpose of financing those aspects of the Coastal Zone Management Program in common with similar programs throughout the state. Some of the objectives of the program, including the planning and regulation objectives, could be articulated as the purposes for which the levy of taxes is imposed. Therefore, a municipality not in the coastal area could levy the tax for general planning purposes, while the coastal zone municipalities could apply the funds to implement the program. Also, such legislation is permissive, not mandatory upon the municipality, so only those municipalities within the coastal zone need levy the tax and then only if a tax were necessary. Finally, this type of legislative program need not be limited to municipalities, counties may also be included.[65]

Home rule counties and municipalities have far greater leeway in creating revenue measures to finance certain aspects of the Coastal Zone Management program. As discussed above, the Illinois Constitution grants home rule units broad powers of self-government, and expressly provides that such powers are to be construed liberally. The power of taxation was placed specifically within the realm of home rule, except that the units are prohibited from imposing income, earnings and occupational taxes in the absence of legislative authorization.[66] While the Constitution provides that the General Assembly may vote by a three-fifths majority to deny or limit a home rule unit's power to tax,[67] to date it has not exercised this power. Therefore, home rule units may impose a property tax upon the property within their boundaries without specific state authorization.

Non-property taxes may also be enacted to finance the Coastal Zone Management Program. The state may authorize local units of government to levy excise taxes and other transfer taxes.[68] In fact, home rule units may adopt such measures without the approval of the General Assembly, unless the three-fifths vote to limit this power is mustered by the legislature.[69] The City of Chicago enacted this type of tax on cigarettes in 1971,[70] and Cook County imposed a tax upon the sale of cars.[71] Such taxes could also be imposed upon the sale of beverages, gasoline, parking, stock transfers and commodity transfers. Revenue generated by these types of tax measures could be allocated to the Coastal Zone Management program. A real estate transfer tax on those properties within the defined coastal zone is a specific means both appropriate and permissible.

5. Special Service Areas

Another technique tied closely to the concept of special assessment (explored in the next Chapter) that may be employed to finance certain

aspects of the Coastal Zone Management Program would be the creation of special revenue service areas. Special service areas are those differential taxing areas created within a municipality or county. The Illinois constitution now authorizes the levy of additional real estate, personal property, and other taxes in an area for the purpose of providing special and intensive services to the specific area that might not otherwise be available to the entire county or municipality.[72]

The Illinois Supreme Court held that this power is not self-executing. In Oak Park Federal Savings and Loan v. Village of Oak Park,[73] the village, a home rule municipality, adopted ordinances establishing a special service area and the issuance of bonds to be retired by the taxes levied against the property. The services to be provided in the service area included the creation of a shopping mall and the acquisition of property for parking. Plaintiffs contended that the village could not, absent enabling legislation adopted by the General Assembly, create a special service area or impose taxes or issue bonds to provide special services--the court agreed. The court relied on the language of Article VII Section 6(l) of the Constitution in arriving at its decision. That Section states that the General Assembly cannot deny or limit the power of home rule units, "to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services . . ."[74] The court held that if the provision was self-executing, then the underlined words would have no meaning. Since constitutional construction requires that each word be given meaning,[75] the court determined that enabling legislation is a prerequisite to the creation of special service areas.[76]

In response, the General Assembly created the "Special Service Areas Act."[77] It provides that both home rule and non-home rule municipalities and counties may create a special service area. The definition given to special services is purposefully broad, and includes "all forms of service pertaining to the government and affairs of the county or municipality."[78] The Act also sets out the procedures that must be followed to create a special service area. Although a public hearing must be held on the issue, no prior referendum is required to create a district. However, if a petition is signed by at least 51% of the electors residing within the special service area and by at least 51% of the owners of record of the land included within the special service area and filed with the municipal or county clerk, the municipality or county is prohibited from creating the special service area.[79] Aside from this "backdoor veto" power, the municipality or county may issue general obligation bonds to finance the services to be provided within the defined area. These bonds are to be retired by the levy of taxes within the special service area.[80] Obviously, the Act provides a ready-made vehicle for the adoption of ordinances to help finance the Coastal Zone Management Program projects. The constitutional provision and the Act are a departure from the requirement of uniformity in the 1870 constitution and its

purpose is to authorize differential taxation.[81] The method of spreading costs is more simplified than under the special assessment procedure, for the property is assessed on the basis of assessed value.[82] A determination of the benefit conferred upon each parcel is not required. Special service areas may be more equitable and less likely to be challenged than special assessments in the present situation because, under the special assessment tests, a specific benefit to a specific parcel may be difficult to show--under the Special Service Areas Act no such showing is required.[83] This is not to say that the Act may be abused and allow improvements to be financed that do not confer any special benefit; rather, the constitutional provision for special service areas and the Act seem to contemplate the same type of improvements that are contemplated under the Program. That is, improvements of Lake Michigan and the coastal zone will certainly be a benefit to the adjacent land but will also be a general benefit to the state as a whole. To date, the court has not held that a special service must only be of value to the area being taxed, but a proper nexus between the service and that area taxed should be demonstrated.

6. General Obligation and Revenue Bonds

Capital improvements in Illinois have historically been financed by local or state bond issues the most common types of which are general obligation and revenue bonds. The former are those bonds which obligate the issuing authority to pay the principal and interest when due from whatever revenue source may be available.[84] The "full faith and credit" of the issuing authority is pledged, usually in terms providing that sufficient taxes will be levied and collected so as to meet the amortization requirements on time. Certain bonds that exclude specified tax revenue sources from their repayment fund may still be general obligation bonds so long as the full faith and credit of the issuing authority is pledged.[85] These bonds may call for an even principal amortization, or for an uneven schedule generally related to money market factors such as lower interest rates which spur investor demand for long term governmental obligations with their tax exempt features.

If revenue bonds are issued, the only security for the bondholders is the capital asset constructed with the bond proceeds. Obviously, such bonds may only be utilized for revenue-producing capital assets. The full faith and credit of the issuing authority is not pledged; therefore, the marketability of such bonds is related to the capital asset and its revenue earning potential. Consequently, higher interest rates are generally demanded for revenue as opposed to general obligation bonds.[86]

No level of government in Illinois is constitutionally prohibited from issuing bonds, although enabling legislation from the General Assem-

bly is required--with one exception. The Illinois Supreme Court held in one of its threshold home rule decisions, Kanellas v. County of Cook,[87] that the power given to home rule counties under the Constitution to issue general obligation bonds is self-executing. Thus, legislation enacted prior to the 1970 Constitution which required a prior referendum as a condition precedent to the issuance of all general obligation bonds by counties is null and void as applied to home rule counties.[88] However, the court noted that the General Assembly by a three-fifths vote may impose such a referendum restriction upon home rule counties.[89]

At the state level, the General Assembly has authorized the use of the state's bonding power to finance various projects. For example, the Transportation Bond Act was enacted in 1971 to authorize the state to issue, sell and provide for the retirement of bonds for the purpose of promoting rapid, efficient and safe transportation.[90] These bonds are general obligation bonds of the State of Illinois and therefore become part of the state debt.[91] Revenue raised by the sale of bonds is used to construct transportation related facilities. A more controversial bond act is the Industrial Pollution Control Financing Act.[92] In order to protect the citizens of Illinois against environmental damage, the Act authorizes the state to "acquire, construct, reconstruct, repair, alter, improve, own, lease, sell and otherwise dispose of pollution control facilities."[93] In effect, the pollution control facilities contemplated under the Act are to assist private business, in that the bonds provide a low cost method of acquiring the facilities.[94] The bonds are revenue bonds and are payable solely from the revenue derived from the sale or lease of the facilities.[95]

These examples suggest the types of bonds that may be issued to finance the Coastal Zone Program. General obligation bonds are a component of state debt and, consequently, passage by the General Assembly may be more difficult. On the other hand, the revenue bond route as typified by the Industrial Pollution Control Financing Act is feasible only if the improvements financed are revenue-producing. As with that Act, the issuance of revenue bonds to help finance controls to be utilized by the private sector is an important boost to both business and the Program purpose sought to be achieved because the construction of shore facilities by industry is made palatable by the low cost of financing.[96] There is considerable leeway as to which governmental body will administer particular bond issuance and the funds derived from their sale. The Department of Transportation might be designated as the controlling agency since it is so intimately tied to the Coastal Zone Management program.[97] If the funds are to be disbursed to other governmental entities, the ultimate decision-making power may best reside with the Department. On the other hand, if the Program draftsmen decide to control the program through purely state administrative review, the creation of a new administrative authority to disburse the revenues may be preferable, for the

mechanism could thereby be created to make the determination of what facilities are needed and what private parties can best make use of them.

7. Shoreline Erosion Protection Districts

Certainly the General Assembly may also authorize other governmental units to issue bonds to finance the various ICZM projects. A new special district could be created for this purpose--there being no constitutional limitation on a special district's power to issue bonds if the legislature so provides. In this vein port districts have been created by the legislature to construct and maintain port facilities. The districts are authorized to issue general obligation bonds after approval is given by the electorate in the district in a referendum--or the district may issue revenue bonds without referendum approval.[98] If general obligation bonds are issued, the districts are empowered to levy a tax in the amount that will be required to amortize such bonds on all the taxable property within the district. Due to the fact that much of the construction contemplated under the Program will not be revenue producing, the creation of a special shoreline erosion protection district with the power to issue general obligation bonds appears to be an efficient way of financing erosion protection aspects of the program. However, the creation of a new special district will add to the already fragmented political structure of the state--a factor possibly objectionable from both the Department's and General Assembly's view. The General Assembly must create the special district if one is to exist, the political feasibility of this route must be seriously considered.

The definitional scope of the extent erosion of the shore is delimited by the concept of the "erosion reach"[99]--the extent to which erosion of any section of the Lake Michigan shoreline is influenced by identical patterns of Lake behavior and drift. This empirical delimitation--capable of accurate plotting by the Illinois Geological Survey[100]-- would be sufficient to establish political boundaries for one or a series of Shoreoine Erosion Protection Districts by the General Assembly.

Because of the limitations on the use of special assessments under the Illinois Constitution to existing districts,[101] the Shoreline Erosion Protection District would rely on other financing techniques. The concept, however, would, on an interjurisdictional basis, follow closely the lines of other governmental redevelopment activities in place in Illinois--and, particularly, the "Neighborhood Redevelopment Corporation Law."[102] The provisions for shoreline erosion protection might be implemented through legislation as follows:

1. Those municipalities within a defined "erosion reach" would be enabled to form a Shoreline

Erosion Protection Commission,[103] "to operate within the boundaries of such . . ." erosion reach.

2. Groups of property owners within areas in which Shoreline Erosion Protection Commissions had hence been formed could then organize Shoreline Protection Corporations " . . . when authorized by and subject to the supervision of the . . . Commission."[104]

3. Those Corporations thereby created would then plan for and implement the erosion protection scheme when certified by the Commission.

8. Bonding--Local Units

An alternative is to vest the bond issuing power in an already existing unit of local government. If general obligation bonds are to be issued, it must be remembered that the principal amount of all outstanding general obligation bonds is an indebtedness of the issuing body.[105] However, the interest on such bonds is not an indebtedness until actually due and payable.[106] As noted above, at the present time home rule municipalities and countries are authorized to incur debt and issue bonds in evidence thereof for proper corporate purposes without referendum.[107] Non-home rule units must first hold a referendum, subject to certain statutory exceptions.[108] The most notable exception for Program purposes is that if the bonds are issued to finance special services in a special service area,[109] no referendum is required. General obligation notes may be issued by a municipality for any public corporate or related purpose.[110] The legislature may also authorize the issuance of bonds by a corporate body for specific purposes. This was done for example, to finance municipal housing and redevelopment programs.[111] As an alternative, the legislature may authorize the municipality to create special districts within its boundaries, with the special districts being similarly empowered to issue the general obligation bonds.[112] Generally, the funds to satisfy the repayment of the bonds come from general taxes to be levied on the property situated in the district.[113] If this type of legislation is contemplated, it should be noted that the General Assembly often conditions the creation of the district upon the prior approval of the electors residing in the district.[114] However, this requirement is not constitutionally mandated. Legislation in this form, the Urban Transportation District Act, was challenged as being unconstitutional in People ex rel Hanrahan v. Caliendo.[115] That Act authorized the creation of urban transportation districts within a municipality. Actual operation was statutorily contingent upon a majority of the voters within its pro-

posed boundaries approving of its creation. The district was authorized to issue general obligation bonds with the debt to be paid by the levy of taxes within the district. If this type of legislation is deemed desirable for the Coastal Zone Management program it is especially interesting to note the Supreme Court of Illinois' opinion of the Urban Transportation District legislation. Most importantly, the court held that the residents within the district are still obligated to pay taxes although the taxing authority does not have the concommitant burden of showing a special benefit to the property taxed.[116] Thus, the court stated that although in the past it had held that transportation improvements created general rather than special benefits, the fact that all persons who might benefit from an improvement are not assessed does not make the assessment unconstitutional.[117] Thus, this type of legislation may be preferable to the levy of a special assessment for program improvements if a special benefit to the properties assessed may be difficult to show.[118]

Revenue bonds may also be issued at the local level. Generally, revenue bonds are those obligations payable from the revenues derived from the operation of the financed service facility and, as indicated earlier, are secured by the facility itself. Rates or charges are imposed upon the user of the service or facility in order to recover the costs of financing the enterprise and the facility so financed must generate its own revenues, without recourse to municipal tax resources. Thus, the borrowing evidenced by the issuance of revenue bonds does not create debt of the municipality within constitutional or statutory limitations.[119] Once again, it must be emphasized that such bonds may be used only for revenue producing facilities. Of course, a specific structure is not required. For example, if part of the program's funds are to be used to rehabilitate beaches, revenue bonds could finance the project if user fees for the affected beach could be collected in an amount sufficient to retire the bonds. At the present time, park districts may charge fees for the use of various park facilities, including beaches and boat houses.[120] Though park districts are prohibited from charging fees to generate income generally, they may charge such amounts to the extent reasonably necessary to retire such revenue bonds as are sold to finance the construction of the particular facility involved and the cost of maintenance.[121] The Program may want to integrate this power of the park districts into its management program to finance this aspect. This should be considered as part of the general plan to coordinate state and local action to implement the program.

The General Assembly has already declared certain public facilities to be suitable for financing by a municipality through the issuance of revenue bonds. The authority to issue revenue bonds is expressly set forth by the legislature and this power must be exercised in the manner specified by the legislative enactment.

The court has been generous in finding that home rule units have the authority to issue revenue bonds. In City of Salem v. McMackin,[122] the court approved the constitutionality of the Industrial Project Revenue Bond Act, by which non-home rule units were authorized to issue industrial revenue bonds to attract new industrial projects and create jobs. The enabling statute authorized municipalities to issue such bonds for projects located up to ten miles from their boundaries.[123] The court also held that although they were not covered by the statute, home rule units could also issue the new type of revenue bonds, even as to the extra-territorial ten miles, under their proprietary home rule powers.[124] Thus, home rule units may issue revenue bonds to construct Coastal Zone Management Program facilities without the necessity of enabling legislation from the General Assembly and these property projects may extend beyond the territorial boundaries of the unit. The court in McMackin held that as the Constitution states that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs,"[125] it may act in a proprietary capacity beyond its corporate limits.[126]

Therefore, if the situation calls for the issuance of revenue bonds, the legislature may specifically enable the issuance at either the state or local level. Furthermore, home rule units may exercise this power without obtaining approval from the General Assembly.

9. Intergovernmental Cooperation and Financing Techniques

The Illinois Coastal Zone Management Program is based on the premise of state/local cooperation. While various techniques cannot be implemented without enabling legislation from the General Assembly, we have seen that other potential revenue programs may be instituted at the local level, especially if home rule units are involved. While state and local cooperation is a cornerstone of the entire program, it is especially important in the realm of revenue as much of the impetus for the various programs rests with local government. While this is already being considered by the formulators of the Program, the Intergovernmental Cooperation Act[127] may provide additional assistance. The Illinois Constitution expressly provides that:

> Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with

> individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues and other resources to pay costs and to service debt related to intergovernmental activities.[128]

Members of the Constitutional Convention believed that this provision was necessary to provide "flexibility with respect to financing intergovernmental undertakings,"[129] and to eliminate the restraining affect of Dillon's Rule[130] thereby removing the Dillon's Rule inhibitions from non-home rule units when in contract with home rule units.

Thereafter, although the Constitutional provision was self-executing, the General Assembly passed the Intergovernmental Cooperation Act, "adding a statutory gloss to the constitutional provision."[131] The Act allows public agencies[132] to enter into agreements to exercise "any power or powers, privileges or authority exercised or which may be exercised by a public agency of this state."[133] Thus, a "public agency" can apparently perform any function that any agency it contracts with can perform.[134] While intergovernmental arrangements have been widely used in Illinois[135] and other states to perform a variety of functions such as fire department services and subdivision regulation services,[136] they are not so limited. Rather, intergovernmental cooperation is an appropriate and proper vehicle to coordinate Coastal Zone Management Program activities. This is especially important when certain revenue raising measures may not, without intergovernmental agreement or legislation, be employed by certain participating units of local government--given the mix of home rule and non-home rule, general and special purpose units of government lining the Lake Michigan shore.

The Act authorizes the use of the two basic forms of intergovernmental cooperation, joint agreements and contracts.[137] Any public agency that is a party to an agreement is allowed to appropriate funds to the "administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking."[138] Therefore, the Act may serve as the umbrella under which the financing techniques contemplated under the program are administered. This method has special significance in that the Program's goals do not end at corporate boundaries, but have great regional impact. Service contracts and joint exercise of power agreements are authorized by the Act and both may serve a function in the program. In a service contract one party furnishes services to other parties, which may be useful when certain machinery is necessary to perform the service. The use of a service contract could avoid duplication of expenses and relieve the acquiring unit of the total expense of the necessary equipment. On the other hand, joint agreements are especially effective for implementing programs in which policy decisions play an important role.[139] Joint efforts may be made in areas over which any of the parties have jurisdiction.

10. New Legislative Schemes

The previous discussion has been an attempt to demonstrate the types of financing techniques that may be employed at the State and local levels to implement the Coastal Zone Management Act. Existing pieces of legislation were also reviewed to demonstrate how proposed legislation may be modelled to fit the needs of the Program. Since all of these techniques have been employed in Illinois for various purposes, it may be presumed that similar legislation may be introduced with some degree of success as the basic revenue structure of the State has not been tampered with. However, other techniques have been employed in other localities that, while raising revenue, are fairly foreign to the Illinois structure. Some of these programs will be reviewed and their viability assessed. Certain of these programs combine regulatory controls with revenue raising aspects. Since efficient land utilization and preservation are important goals of the program, certain combined techniques seem appropriate to the situation. Their major problem, as will be seen, is that certain of these proposals would drastically change the basic revenue system of local government--the property tax.

11. Vermont

An especially interesting proposal is based upon Vermont legislation. In 1973, Vermont enacted a tax applying specifically to gains realized from the sale of land.[140] The tax is confined to gains realized on short term[141] land holdings and is designed to control short term land speculation by limiting the profits and hence discouraging rapid turnover of land. Thus, land speculation is reduced while at the same time revenue is raised which may be used to finance a Coastal Zone Management Program. Vermont uses the proceeds to prepare property tax maps and to support a property tax relief program for landowners with limited income.[142] Under the Vermont statute, all sales or exchanges of land are taxable except the first acre or less necessary for the use of the seller's principal residence. Furthermore, only the gains on land are taxed, therefore, the purchase price must be apportioned between the realty and improvements.[143] Gains are taxed on a sliding-rate scale, the rate increasing directly with the percentage of profit and inversely with the length of the holding period. The maximum tax rate of 60% is applied to a gain of 200% or more or land held less than one year.[144] The constitutionality of the Act was challenged in Vermont in Andrews v. Lathrop.[145] The court there upheld the statute and dismissed the allegations that the measure violated the equal protection clause. The Vermont court found that the promotion of a state policy of deterring land speculation is a permissible legislative purpose and that the statutory classification used to determine those land sales to be taxed is rationally related to that purpose.[146] The court further held that although the tax is super-

imposed upon existing state and federal capital gains taxes, it does not result in unconstitutional double taxation.[147] As noted above, Illinois courts have also held that differential treatment for purposes of taxation are constitutional if the classificiations are reasonable.[148] Most importantly, the Illinois Supreme Court has also held that the exercise of both the police and revenue powers of this state may be combined in one act, provided they relate to the same subject.[149]

However, a formidable barrier stands in the way of passage of similar legislation in Illinois. As earlier noted, the Illinois Constitution requires that any tax on or measured by income must be at a non-graduated rate.[150] Also, at any one time there may be no more than one such tax imposed by the state on individuals and corporations.[151] Thus, if the tax is deemed to be a tax on income it would be unconstitutional under Illinois law for two reasons: first, in effect the tax is a penalty on land speculation as the tax increases if the land is held a short time and a great profit is received on the sale. The amount of tax is dependent upon these two variables, so that it becomes a prohibited graduated tax. Secondly, it may be deemed to be a second income tax which is also constitutionally prohibited.[152] However, this type of taxing system may be valid in Illinois if the form can be changed so that it is no longer viewed as an income tax. For example, it may be viewed as a tax on the transfer of property. The Real Estate Transfer Tax Act,[153] which is a tax imposed on the privilege of transferring title to real estate, is based upon the value of the real estate and a tax is imposed at the rate of 50¢ for each $500.00 of value. This tax could be restructured to include the holding period as a factor in determining the rate of taxation; however, there may be a problem in limiting the tax to only the value of the land alone.[154] Also, the tax would not take into account the profit made on the sale, rather it would be based on the actual consideration paid for the property. Another alternative would be to determine the amount of tax on the basis the seller has in the property.[155] If the tax were computed on the basis in the property times a percentage determined by the holding period[156] the tax would not be a tax on income. Once again, such a tax would fail to recapture the profit made on the sale, which is an integral part of the Vermont statute. Thus, short term speculation would not be penalized and the deterrent effect on the legislation would be eliminated for the most part.[157]

12. Other Tax Alternatives

Alternative taxation schemes devised by legislatures and commentators attempt to depart from the concept of ad valorem real property taxes. Critics are discontented with the property tax for a variety of reasons. It is a regressive tax, that is, one which falls most heavily on those with the least ability to pay and the greatest need for tax services.[158]

This is because the property tax taxes ownership of capital resources rather than liquid assets or spendable income, and therefore, is often not geared to ability to pay.[159] Furthermore, since an assessor must value each improvement to the property according to his determination of its effect on the fair cash value of the property as a whole, minor improvements may have an extraordinary impact on the amount of the total assessment and the owner may be reluctant to undertake them.[160] The property tax also encourages urban and suburban sprawl because of the almost cyclic pattern of the rising costs of services occurring in part because of the deterioration of the area due to the property tax's effect on basic maintenance and development and in part because many major taxpayers are drawn out of the area by both rising taxes and deteriorating conditions and services.[161] Furthermore, it fails to penalize holding large parcels of land in an undeveloped state for speculation as to their future development value, which tends to tie up the prime undeveloped land in or near populated areas.[162]

Therefore, some suggest that the property tax should be eliminated and replaced with a "site value tax." Such a tax is set at a high rate but only taxes the worth of the underlying land, regardless of the value of improvements.[163] In this way, the holding of land in an undeveloped condition would be discouraged, and at the same time, no tax penalty would attach to the installation of expensive improvements in order to make the land realize its full income potential. The site value tax should permit accurate capitalization of property taxes proportional to the potential development utility of a parcel, in its purchase price and should also fix costs at a predictable level for landowners.[164] However, the rates would probably have to be quite high in relation to the value of the land in order to meet the present revenue levels yielded by the ad valorem property tax. Site value taxation may also be difficult to administer because of the complexity of assessing the worth of land independent of its improvements.[165]

This system of taxation may have both beneficial and adverse effects on the coastal zone. It would not change the basic financing techniques discussed earlier, except to the extent that the underlying system of property that is taxed is changed. While it is an effective system of taxation for urban areas, it may be detrimental in the nonurbanized areas of the coastal zone since it will likely cause increased development. However, a more equitable system of taxation may result in increased revenues for local government and consequently for the Coastal Zone Management Program. Implementation of a site value taxation program would necessitate a complete overhaul of the existing statutory framework with its built-in legislative opposition,[166] and is unnecessary to the accomplishment of Program goals.

Another possible system somewhat related to special service areas currently enabled in Illinois is the differential taxation approach.[167]

Each taxing district would be given the authority to classify areas within its jurisdiction "based upon each area's ability to receive municipal-type services"[168] and then taxing them accordingly.[169] This system is similar in concept to special service areas, special districts and special assessments as it is grounded in a cost-benefit approach for taxation.[170] Differential taxation would be easier to administer than the site value taxation program since the value of the land and the buildings need not be apportioned. While it is arguable that such a system would violate the uniformity clause of the Illinois Constitution, counties with a population of more than 200,000 may classify real property for the purpose of taxation.[171] Therefore, this type of classification system may overcome constitutional objections at least in counties with a population of more than 200,000--certainly applicable in the Lake/Cook context of the Lake Michigan shore.

Differential taxation may also be characterized as a land service charge tax which is also a cost-benefit system of taxation. Since the cost of providing various municipal services varies substantially within an area, land service charge taxes defray the cost of these services in the most equitable way.[172] Those areas receiving the greatest benefit from the program's projects would also be responsible for the burden of paying the costs. The cost of such public service should be prorated on the basis of area and distance rather than assessed values.[173] However, the land service charge concept is more readily adaptable to paying the cost of services such as water, as the taxed land is directly benefited and the cost, such as for running pipes to the property can be readily ascertained.[174] It will be far more difficult to compute the marginal cost of the program's benefits to each parcel of taxable property.[175]

To avoid this problem, "betterment levies" may be assessed against taxable property. In contrast to user charges which are directly related to the cost of services, "betterment" is characterized as:

> any increase in the value of land (including buildings) arising from control or local government action . . . (and) enhancement in the value of property arising from general community influences, such as the growth of urban populations.[176]

One commentator suggests that the definition should include actions of private households and firms on other parcels.[177] Such a levy may better reflect the benefit conferred upon land by the Coastal Zone Management Program for rehabilitation of the Lake and its environs will benefit property in the Coastal Zone but the specific dollar amount will be impossible to compute.[178]

Finally, the development tax is another possible revenue raising measure that could be utilized to finance the program. This tax is an

alternative to the dedication procedure currently required by subdivision control ordinances.[179] A development tax is the levy of taxes upon all new development, proportionate to the burden on the community associated with the influx of population which the development causes.[180] A system of incentives could be incorporated into this tax to complement present subdivision controls and building codes.

Conclusion

All of these techniques have a great impact on the entire system of local taxation and while they may be a means of providing additional revenue for the Coastal Zone Management Program this is basically a side effect. Although certain of these measures may be needed in Illinois to provide a more equitable system of taxation, the possibility of achieving the passage of such enactments will require great efforts in terms of time and energies. So, while the more traditional means of financing the program may appear less glamorous, enabling legislation may be more easily obtainable.

Given the in place revenue system in Illinois, tied to the enablement of intergovernmental cooperation, this State seems assured of an adequate system to backstop federal financing under the Coastal Zone Management Act of 1972.

FOOTNOTES

1. Reif v. Barrett, 355 Ill. 104 (1934).

2. S. Bloom, Inc. v. Korshak, 52 Ill. 2d 56 (1972).

3. Allied Stores v. Bowers, 358 U. S. 522 (19); People ex rel Kubner v. Cullerton, 58 Ill. 2d 266 (1974).

4. Diana Shoe Stores v. Department of Revenue, 5 Ill. 2d 112 (1955).

5. Ill. Const. Art. IX sec. 4.

6. See e.g., People ex rel Kubner v. Cullerton, 58 Ill. 2d 266 (1974); People ex rel Hornefenger v. Burris, 408 Ill. 68 (1951).

7. 55 Ill. 2d 437 (1973).

8. Id. at 442.

9. People ex rel Skidmore v. Anderson, 56 Ill. 2d 334 (1974).

10. Fiorito v. Jones, 48 Ill. 2d 566 (1971).

11. Ill. Const. Art. IX sec. 4(a).

12. Ill. Const. Art. IX sec. 4(b).

13. Id.

14. See note 182 and accompanying text infra.

15. Ill. Const. Art. IX sec. 9(a).

16. Hanrahan v. Calienda, 50 Ill. 2d 72 (1971).

17. Ill. Const. Art. IX sec. 5(a).

18. Ill. Const. Art. IX sec. 5(c).

19. A home rule unit is defined in the Ill. Const. Art. VII sec. 6(a) as "[a] county which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000." Other municipalities may elect by referencum to become home rule units.

20. Id.

21. Ill. Const. Art. VII sec. 6(d).

22. Ill. Const. Art. Vii sec. 6(e).

23. Ill. Const. Art. VII sec. 6(g).

24. Ill. Const. Art. VII sec. 6(l); see discussion at note , infra.

25. Ill. Const. Art. VII sec. 7.

26. Id.

27. Baum, Illinois Home Rule, 1972 Law Forum 559,560.

28. Dillon's rule is best expressed in his treatise. A Treatise on the Law of Municipal Corporations:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . not simply convenient but indispensable.

Cited in Assembly on Home Rule in Illinois, Home Rule in Illinois, 13 (1973); Appeal Bd. of Environmental Control v. U. S. Steel Corp., 48 Ill. 2d 575 (1971).

29. People ex rel. Gish v. Lake Erie and W. R. Co., 248 Ill. 32 (1910).

30. Ill. Const. Art. VII sec. 8.

31. Robbins v. Kadyk, 312 Ill. 290 (1924).

32. Id. at 293.

33. People ex rel. City of Salem v. McMackin, 53 Ill. 2d 347, (1972).

34. Id. at 293.

35. Ill. Const. Art. XI sec. 1 (1970).

36. Titus v. The Texas Co., 55 Ill. 2d 437 (1973).

37. See e.g., Ill. Rev. Stat. ch. 127 secs. 701-710 (1973).

38. Assembly on Home Rule in Illinois, Home Rule in Illinois, supra., note 28 at 13.

39. Ill. Rev. Stat. ch. 120 sec. 418 (1973).

40. Ill. Rev. Stat. ch. 120 sec. 424 (1973).

41. Titus v. The Texas Co., 55 Ill. 2d 437, 442 (1973).

42. People ex rel. Hanrahan v. Caliendo, 50 Ill. 2d 72, 83 (1971).

43. There are no constitutional restrictions on these measures.

44. Young, The Revenue Article of the Illinois Constitution of 1970, 1972 Law Forum 312, 331.

45. Ill. Rev. Stat. ch. 24 sec. 8-2-1 (1974).

46. Illinois Institute for Continuing Legal Education, 1 Illinois Municipal Law 13.10 (1974).

47. See e.g. Ill. Rev. Stat. ch. 24 sec. 11-19-4 (1974).

48. See e.g. Ill. Rev. Stat. ch. 24 sec. 11-45.1-4 (1974).

49. See e.g. Ill. Rev. Stat. ch. 24 sec. 11-123-11 (1974).

50. This is due to the debt limitation placed upon municipalities by the General Assembly. See e.g., ch. 24 sec. 8-5-1 (1974).

51. Ill. Rev. Stat. ch. 24 secs. 11-99-1, 11-99-3 (1974).

52. Ill. Rev. Stat. ch. 24 secs. 11-95-7, 11-95-i (1974).

53. Ill. Rev. Stat. ch. 24 sec. 11-63-1 (1974).

54. Ill. Rev. Stat. ch. 24 sec. 11-45.1-4 (1974).

55. Ill. Rev. Stat. ch. 24 sec. 11-143-1 (1974).

56. Ill. Rev. Stat. ch. 24 secs. 11-73-1, 11-73-2 (1974).

57. Ill. Rev. Stat. ch. 24 sec. 11-123-11 (1974).

58. Ill. Rev. Stat. ch. 24 secs. 11-112-1, 11-112-2 (1974).

59. 33 U. S. C. sec. 1451 et. seq. (1973); Mandelker and Sherry, The National Coastal Zone Management Act of 1972, 7 Urban L. Ann. 119 (1974).

60. "Apart from statutory prohibitions, the authority to levy taxes is purely statutory." People ex rel. Bailey v. Illinois Central R. R. Co., 407 Ill. 426 (1970).

61. See e.g., Ill. Rev. Stat. ch. 24 sec. 11-67-4 (1974).

62. People ex rel. Honefenger v. Burris, 408 Ill. 68 (1951).

63. Id. at 72.

64. People ex rel. Kubner v. Cullerton, 58 Ill. 2d 266 (1974).

65. Ill. Const. Art. VII sec. 6(m).

66. Ill. Const. Art. VII sec. 6(e).

67. Ill. Const. Art. VII sec. 6(g).

68. Young, The Revenue Article of the Illinois Constitution, supra, note 44 at 333.

69. This ordinance was sustained in S. Bloom Inc. v. Korshak, 52 Ill. 2d 56 (1972).

70. The constitutionality of this ordinance was upheld in City of Evanston v. County of Cook, 53 Ill. 2d 312 (1972).

71. Assembly on Home Rule in Illinois, Home Rule in Illinois, supra note 28 at 85.

72. Ill. Const. Art. VII secs. 6(e), 7.

73. 54 Ill. 2d 200 (1973).

74. Id. at 203.

75. Tuttle v. National Bank of the Republic, 161 Ill. 497 (1896).

76. The court may have come to this conclusion since the tax contemplated amounted to differential taxation which was a departure from the prior state constitutional law. Id. at 204.

77. Ill. Rev. Stat. ch. 120 sec. 1301 et seq. (1975).

78. Ill. Rev. Stat. ch. 120 sec. 1302 (1975). The Program's legal consultant participated in the drafting of this legislation.

79. The petition must be filed within 30 days following the final adjournment of the public hearing. After a petition is filed, the

subject matter of the petition may not be proposed in the same area for two years. Ill. Rev. Stat. ch. 120 sec. 1309 (1975).

80. Ill. Rev. Stat. ch. 120 sec. 1310 (1975).

81. See Note 761 supra.

82. Ill. Rev. Stat. ch. 120 sec. 1310 (1975).

83. The only statutory requirement is that the area be provided with special governmental services which are in addition to those services provided generally throughout the governmental unit. Ill. Rev. Stat. ch. 120 sec. 1302 (1975).

84. Kenkel, Legal Aspects of Financing Certain Public Improvements, 6 Urban Law 381, 382 (1974).

85. Id.

86. Id.

87. 53 Ill. 2d 161 (1972).

88. The home rule unit's ordinance prevails over a conflicting state statute adopted prior to the enactment of the 1970 constitution. Id. at 166.

89. Id. at 165. See Ill. Const. Art. VII sec. 6(g).

90. Ill. Rev. Stat. ch. 127 sec. 701 et. seq. (1975).

91. Ill. Const. Art. IX sec. 9(a).

92. Ill. Rev. Stat. ch. 127 sec. 721 et. seq. (1975).

93. Ill. Rev. Stat. ch. 127 sec. 727 (1975).

94. See Early, Financing Pollution Control Facilities Through Industrial Development Bonds, 27 Tax Law 85 (1973).

95. Ill. Rev. Stat. ch. 127 sec. 729 (1975).

96. See People ex rel City of Salem v. McMackin, 53 Ill. 2d 347 (1972); Note, The Clean Air Financing Act, 11 Houston L. Rev. 1194, 1200 (1974).

97. For example, The Anti-Pollution Bond Act, Ill. Rev. Stat. ch. 127 sec. 451 et. seq. (1975) is appropriately administered by the Illinois Environmental Protection Agency.

98. See e.g., Ill. Rev. Stat. ch. 19 sec. 186 (1975).

99. Report, U.S. Army Corps. of Engineers, Illinois Coastal Zone Management Program, March, 1976.

100. IGS Report to Illinois Coastal Zone Management Program. See, also, IGS, Map Appendix, ICZMP, October, 1975.

101. See, note 38, supra., et seq.

102. Ill. Rev. Stat., ch. 67 1/2 secs. 251-294, incl. (1975).

103. See, e.g., Ill. Rev. Stat., ch. 67 1/2 sec. 254 (1975).

104. See, e.g., Ill. Rev. Stat., ch. 67 1/2 sec. 256 (1975).

105. See, e.g., People v. Hamilton, 373 Ill. 124 (1940).

106. Id.

107. See note 88 and accompanying text, supra.

108. Ill. Rev. Stat. ch. 24 sec. 8-4-1 (1975).

109. Id.

110. Ill. Rev. Stat. ch. 24 sec. 8-4-25 (1975).

111. Ill. Rev. Stat. ch. 67 1/2 sec. 91.124 (1975).

112. See, e.g., Ill. Rev. Stat. ch. 111 2/3 sec. 501 et seq. (1975).

113. See, e.g. Ill. Rev. Stat. ch. 111 2/3 sec. 512 (1975).

114. See note 115 and accompanying text, infra., but note also the "back door" method for Special Service Areas.

115. 50 Ill. 2d 72 (1971).

116. Id. at 79.

117. Id.

118. See ch. and its accompanying text, infra.

119. Hairgrove v. City of Jacksonville, 336 Ill. 163 (1937).

120. Ill. Rev. Stat. ch. 105 sec. 8-10 (1975).

121. See, e.g., Ill. Rev. Stat. ch. 105 sec. 9-1d (1975).

122. 53 Ill. 2d 347 (1973).

123. 53 Ill. 2d at 365.

125. Ill. Const. Art. VII sec. 6(a).

126. 53 Ill. 2d at 365.

127. Ill. Rev. Stat. ch. 127 sec. 741 et seq. (1975).

128. Ill. Const. Art. VII sec. 10.

129. Comment, The Illinois Intergovernmental Cooperation Act. 1974 U. Ill. L. Forum 498, 499.

130. See, note 28 supra.

131. Comment, The Illinois Intergovernmental Cooperation Act, supra., note 128 at 500.

132. Public agencies are defined as "a unit of local government as defined in the Illinois Constitution of 1970." Ill. Rev. Stat. ch. 127 sec. 742 (1973). In turn the Constitution includes as units of local government counties, municipalities, townships, special districts, and units "designated as units of local government by law, which exercise limited governmental power or powers in respect to limited governmental subjects," but specifically excludes school districts. Ill. Const. Art. VII sec. 1.

133. Ill. Rev. Stat. ch. 127 sec. 743 (1975).

134. Comment, The Illinois Intergovernmental Cooperation Act, supra. note 128 at 500.

135. See, DLGA/NIPC INTERGOVERNMENTAL COOPERATION IN ILLINOIS (1976).

136. Comment, The Illinois Intergovernmental Cooperation Act, supra., note 128 at 500.

137. Ill. Rev. Stat. ch. 127 secs. 743, 745 (1975).

138. Ill. Rev. Stat. ch. 127 sec. 744 (1975).

139. Comment, The Illinois Intergovernmental Cooperation Act, supra., note 161 at 500.

140. Vt. Stat. Ann. title 32 secs. 10001-10 (1973).

141. "Short term" is defined as less than six years. Vt. Stat. Ann. title 32 sec. 10003 (1973).

142. Comment, State Taxation, 49 Wash. U. L. Rev. 1159 (1974).

143. Id. at 1161.

144. The minimum rate of 5% applies to gains of 0-99% on land held between five and six years.

145. 132 Vt. 256, 315 A. 2d 860 (1974).

146. Id.

147. Id.

148. See note 8 and accompanying text supra.

149. National Drag Racing Enterprises, Inc. v. Kendall Co., 54 Ill. 2d 79 (1972).

150. Ill. Const. Art. IX sec. 3(a).

151. Id.

152. Id.

153. Ill. Rev. Stat. ch. 120 sec. 1001 et seq. (1975).

154. Currently property is valued for the assessment purposes on the basis of both the land and structures thereon. Ill. Rev. Stat. ch. 120 sec. 501 (1975).

155. This would be computed under the provisions of the Federal Internal Revenue Code. This procedure is authorized by the Illinois Constitution, Art. IX sec. 3(b).

156. See note 154 and accompanying text supra.

157. In effect, such legislation would lose its regulatory function and would become simply another taxation measure.

158. See, e.g., Bab, Taxation and Land Use Planning, 10 Willamette L. J. 439, 441 (1974).

159. Zimmerman, Tax Planning for Land Use Control, 5 Urban Law 639, 647 (1973).

160. Id. at 650.

161. Id. at 651.

162. Note, Site Value Taxation: Economic Incentives and Land Use Planning, 9 Harv. J. Legis. 115 (1971).

163. Id. at 125.

164. Zimmerman, supra. note 159 at 655.

165. Note, Site Value Taxation: Economic Incentives and Land Use Planning, supra. note 162 at 139.

166. Not only must assessment methods be changed, but a site value taxation system may run afoul of the debt limitation placed on municipalities. This is due to the fact that the amount of permissible indebtedness is expressed as a percentage of the assessed value of the location's tax base, and the tax base will be decreased if only land values as opposed to improvements are assessed. Id.

167. This method is similar to Illinois' special service area legislation; and bills are pending in the Illinois General Assembly that would so implement.

168. Herman, Ad Valorem Financing of Law Enforcement Services: An Equitable Solution to an Inequitable Condition, 19 U.C.L.A. L. Rev. 59, 90 (1971).

169. Zimmerman, supra. note 159 at 668.

170. Ill. Const. Art. IX sec. 4(b).

171. Bab, supra. note 190 at 445.

172. Id.

173. Id. at 446.

174. See, e.g., Downing, User Charges and the Development of Urban Land, 26 Nat'l. Tax J. 631, 633 (1973).

175. Grimes, Urban Land Taxes and Land Planning, 12 Finance and Rev. 16, 17 (1975).

176. Id.

177. User charges are most often used to finance construction of a municipal infrastructure. Grimes, supra. note 175 at 20.

178. Zimmerman, supra. note 159 at 675.

179. Id.

180. Id. at 676.

CHAPTER IX

PROPERTY OWNERS AND THE SHORELINE:
PAYING THE COSTS OF BENEFITS CONFERRED

The question to be considered in this Chapter is whether the appropriate public authorities may require in-kind consideration from shoreline landowners in return for benefits conferred upon them via public shoreline erosion control projects. Analytically, the question is: can riparian owners be compelled to pay for some or all of the cost of an erosion control program that benefits their property. If they can, the question then becomes whether in-kind consideration, in lieu of cash, may be demanded. The in-kind consideration in mind here is, of course, an interest in the benefitted land, an easement or a building restriction for the Program purposes.

The doctrine upon which one might conclude that riparian owners can be compelled, as aforesaid, is that of "local improvements."[1] Suffice it to say that, if a shoreline erosion control project is a local improvement, then some or all of the costs thereof may be charged against that land specially benefitted by the project by levying a special assessment or imposing a special tax.

This Chapter further proposes the establishment or, at least, the enablement of Shoreline Erosion Protection Districts by legislation.

1. Herein of Local Improvements

We must now consider, therefore, what is a "local improvement."[2] Interestingly enough, the term is defined neither in the Illinois Constitution[3] nor in the statutes.[4] It is therefore to the decisional law that one must turn for definition. Unfortunately, the law is not as clear as one might wish and, therefore, perhaps the question can be broken down into its constituent parts for ease of understanding. First, what is an "improvement"? Second, what is a "local improvement"? Third, what units of government have the authority to finance local improvements by special assessments? Fourth, how must or can a local improvement be financed? And fifth, how may the costs of local improvements be allocated as between the public generally and the particular lands specially benefitted? We will not, in this Chapter, consider the question of how a local improvement may be carried out.[5]

a) What is an Improvement?

One is reminded of Gertrude Stein's remark that "a rose is a rose is a rose" for the law seems to state that an "improvement" is whatever

a municipality may lawfully make, construct or provide for. To determine what that may be, one is directed to a reading of the Illinois Municipal Code[6] from cover to cover. However, one critical aspect of what constitutes an improvement can be identified: There must be permanency about it. In City of Chicago v. Blair,[7] the city sought to confirm a special assessment for an alleged local improvement of a street. The "improvement" in question consisted of sprinkling the street with water four times a day between April 15, 1893 and November 15, 1893. Whether the activities were local or not was not decided in the case because the court held that sprinkling did not constitute an improvement: it was not permanent. Therefore the special assessment failed.

Examples of public improvements, of course, are legion: sewer lines;[8] parks;[9] drainage facilities;[10] electric generating facilities, poles, conductors, lamps and necessary appliances;[11] waterworks, reservoirs and mains;[12] streets;[13] viaducts;[14] street paving;[15] and even the widening of the Chicago River.[16] Thus, certainly a shoreline erosion control project constitutes a public improvement. There are several problems remaining.

b) What is a "Local Improvement"?

Now the difficulties can be focused upon. Illinois case law seems to have developed at least two answers to the question. It remains to be seen whether they are consistent. First, there is what can be characterized as the narrow rule:

> A local improvement is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality; and the test as to whether such an improvement is local is whether it specially benefits the property assessed.[17]

Under this rule the question to be asked, arguably, is only whether the particular improvement specially benefits the property assessed. If the fact of such benefit can be found, then, presumably, a special assessment may be properly levied.

There is also what may be considered the broad rule:

> If its purpose and effect are to improve a locality, it is a local improvement although there is incidental benefit to the public, but if the primary purpose and effect are to benefit the public it is not a local improvement although it may incidentally benefit property in a particular locality.[18]

Under this test, the question is not whether particular property is specially benefitted but rather what the overall, primary or principal purpose and effect of the particular improvement might be. In other words, the critical factor is the improvement itself. Under the narrow test, the critical factor is the enhancement of the value of that land specially assessed. Finally, there is a line of cases which seems to adopt both tests.[19] The "weight of authority" seems to uphold the broad rule resulting in a number of interpretative problems.

Let us hypothecate a particular improvement that will confer 40% special benefit and 60% public benefit. Arguably, under the narrow rule, the improvement can be treated, in part, as a local improvement--under the broad rule, it could not. To go even further, a rigorous application of the narrow rule would allow imposing an assessment in cases where the special or private benefit was only, say, 10% of the total benefit. One reaches the same result under both rules as to the characterization of the public improvement as local or not only in those situations where the special benefit exceeds 50% of the total benefit.

To examine the matter further: the development of the two rules follows very clearly from the fact that any improvement is, in some sense, local[20]--but any improvement is also, in some sense, public. So there we have it. The question is, therefore, at what point do we say that an improvement is "local enough" to justify the levying of a special assessment or special tax. The two rules are merely different approaches to the problem.[21]

One reason why the issue has not been clearly resolved in Illinois is the practice of dividing or cutting up public works programs into "local" and "general" parts. Thus, in City of Elmhurst v. Rohmeyer,[22] the court made a distinction between sewage treatment plants (general) and sewer mains (local). In Ewart v. Village of Western Springs,[23] the court distinguished between electric generating stations (general) and poles, wires, lamps and conductors (local).[24]

The obvious question is whether a shoreline erosion control project can be bifurcated in a similar fashion. There is precedent which suggests that it cannot. In City of Chicago v. Law,[25] the city sought to confirm special assessments in connection with the widening of the south branch of the Chicago River at around West 18th Street. In rejecting the City's position, the court said:

> The Chicago River is a navigable stream of the United States. The improvement in question was instituted for the purpose of improving commerce . . . The object: to benefit the public at large, to permit boats and vessels to pass up and down the river with greater facility.[26]

The court found the improvement, if anything, to be a national improvement. Nor, apparently, did it help matters any when the evidence showed that the city had not obtained the approval of the Secretary of the Army.[27] The last thing the court seemed concerned about in that case was whether the project could be separated into general and local parts. While the case casts a shadow, there are other factors inherent in the Lake Michigan shoreline context that may yet save the day.

First, the mere fact that public waters are involved is not dispositive of the matter. Consider, for example, the saga of Lake Shore Drive.[28] The fact that the Drive is located on what used to be the bed of the Lake does not appear to affect the character or nature of the road.[29] Consider, also the related epic of Lincoln Park's growth and development.[30] Lincoln Park is a park--a public ground--and improvements thereto may be financed in the usual manner, including, with statutory authority, special assessments.[31]

Secondly, the purpose of an erosion control project may have nothing to do with navigation--a tenuous connection, in fact, at best--but rather, as its very name suggests, to prevent the shoreline from being consumed. In such a situation there is absolutely no doubt that riparian landowners are benefitted by such a project. Lake shore property must be worth more with the assurance that it will not erode into the Lake, in whole or in part, than it would be worth absent such assurance. Furthermore, it is hard to make out a case that non-riparian lands are benefitted by such a project. One supposes that there is some indirect or diffuse benefit to all land located even remotely near the Lake, but the difference in the degree or extent of the benefit is almost one of kind. The analogy would be that the owners of property on block "A" are "benefitted" by the paving of the alley in block "B" located across the street from block "A". But one would hardly say that the landowners on block "A" may be specially assessed for the benefits created or that the landowners on block "B" may not be specially assessed. No, the problem lies with the judicial views of what constitutes a local improvement. Assuming that the broad rule prevails,[32] it may prove difficult to define or delineate a shoreline erosion control project the benefits of which are at least 50%--i.e., primarily--special or local in nature. In this connection, the fact that some of the lands specially benefitted are owned by public agencies does not affect the character of the improvement. Put another way, special benefit to publicly owned lands does not constitute "public benefit" for purposes of applying the rules on the character of an improvement.[33] Therefore the task, while difficult, may not be impossible. But the Law decision[34] at the very least requires that great care be given to defining a project that confers sufficient private benefit so as to permit the levy of special assessments. Also, it is absolutely necessary that any project receive the approval of the Army Corps of Engineers--in advance.[35] Finally, it may be possible, in an appropriate case, to convince the courts to discard or at the very least modify the

so-called broad rule. We cannot help but note that, once again, a little help from the legislature through creative law-making will go a long way towards accomplishing that objective.

c) Authority to Finance Local Improvements by Special Assessments?

It is clear that existing local units of government have requisite special assessment authority.

In Illinois, counties, municipalities and special districts may finance improvements by means of special assessments. This power is expressly given to counties and municipalities by the Constitution.[38] However, Article VII, Section 8, provides that the General Assembly cannot authorize local units to make improvements by special assessment if they did not have that power on the effective date of the Constitution.[39] Thus, while a unit of government may be created by the General Assembly to administer shore erosion under the mandate of the Coastal Zone Management Program,[40] if any of the improvements contemplated under the program are to be financed by means of a special assessment, such assessment may only be levied by counties, municipalities or special districts created prior to 1970. Once again, the necessity for cooperation and intergovernment contract between levels of government to implement the program is demonstrable.

Special districts are municipal corporations created by the legislature for the purpose of wielding such governmental powers of the State and only those powers as the legislature by law has confided to it.[41] It is within the power of the legislature to settle the characteristics of those functions; to prescribe the extent and duration of the powers delegated to such agencies; and the means whereby it shall be determined what, and how much, territory the delegated power shall cover.[42] While the legislature may create new special districts to carry out the functions of the program, they would not have the power to levy special assessments. Only those special districts, such as sanitary districts,[43] or general purpose units of government having the power to make "local improvements" which are already authorized to levy special assessments may be a proper vehicle to construct certain coastal zone shoreline improvements to be financed through the assessment technique. Sanitary district enabling legislation empowers such districts to construct compensating or controlling works in the Great Lakes when it is proper for the purposes of complying with the Drainage Code.[44]

Of course, the General Assembly may still authorize a special district to finance improvements by ad valorem property tax receipts,[45] user fees,[46] or bonds. These measures are discussed in other sections of the Report. The power to derive revenue by means of ad valorem property taxes may be granted by the legislature outright, or be conditioned upon approval of the electors in the district by referendum.[47]

Financing aspects of the program by means of special assessments is still feasible if done by counties, municipalities or special districts with this power. This route is to be distinguished from general taxation. The Illinois Supreme Court distinguished the two methods in People v. B & O Railroad Co.[48] The Court stated that:

> The general levy of taxes is understood to exact contributions in return for the general benefits of government and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and particularly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition, to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it.[49]

The issue of when a special assessment may properly be levied has also been addressed by the Illinois courts. The prerequisite for levying a special assessment is that the property being assessed must derive a benefit from the improvement being constructed by the funds derived from the special assessment, to a greater extent than other property.[50] In general, the benefit is the increase in fair market value of the property that will be brought about by the assessment.[51]

Accordingly, a wide range of possibilities exist for the exercise of the authority in the Illinois Coastal Zone. One would have to consider, however, whether statutory action is needed, notwithstanding home rule powers. Certainly the Illinois Department of Transportation, as guardian of the public trust in Lake Michigan,[52] would have to grant its approval. But, more importantly, since the public trust is directly involved, specific state legislative action is probably necessary.[53]

d) How Must or Can a Local Improvement be Financed?

The fact that a particular improvement is local does not mean that it must be financed by a special assessment or special taxation but only that the public agency has the choice or option of financing the improvement, in whole or in part, specially, as noted, or through general taxation.[54] Usually the question is whether the special assessment or special taxation device may be used at all.[55] There is reason to believe, however, that once a series of improvements has been financed by special assessment, it would be unfair to let further improvements in that series or of that same general character be financed except by special assessments.[56]

e) How May The Costs of Local Improvements be Allocated as Between the Public Generally and the Particular Lands Specially Benefitted?

The great danger is that particular landowners may be forced to pay for general public benefits. As pointed out by Thorpe and Lucansky,[57] the statutory and case law provide that no land shall be assessed a greater amount than it is actually benefitted.[58] They also point out that as a rule of thumb at least 10% of the cost of any improvement should be treated as public benefit.[59] If it can be fairly said that the public benefit exceeds 10% then perhaps a like percentage of the cost should be treated as public benefit but whether this result is legally compelled remains a question.[60] As to a particular piece of land receiving a special benefit, the rule is clear: the assessment against that particular parcel may not exceed the benefit determined to have been received or conferred.

Assuming that said benefit can be calculated,[61] then it is evident that the test for determining whether a particular improvement is a local improvement ought to be the so-called "narrow" test focusing on whether a particular parcel has received a special benefit[62] rather than the rule that focuses on the purpose or intent of the improvement in question.[63] It is the fact of special benefit and only that fact which justifies the imposition of a special assessment or special tax. Since, under well-settled Illinois law the amount of that assessment or tax cannot exceed the value of the actual benefit, then it should not matter what the purpose and intent of the improvement may happen to be. If we allow the imposition of the assessment or tax in some cases, why not, simply put, allow it in all cases? It should be noted that under this approach it is conceivable that the special assessment device might be used more often--but that factor is irrelevant. The difficulty comes in deciding at what point the benefit actually received becomes de minimis so that the amount of an assessment approaches zero--a problem that is always present when an assessment is spread.

It is time to return to basic policy considerations. Recapture of socially-created value is increasingly recognized as a socially desirable course of action.[64] The special assessment device is one means of effecting such a recapture and its use in Illinois is well-established. There may be difficulties with its use, as noted,[65] but if a special benefit can be identified, and proven, then the public should be allowed to recapture it, regardless of the purpose of the public improvement giving rise to the special benefit in the first place. The artificiality of the so-called "broad" rule becomes self-evident and it should be discarded.

A different set of questions is raised with respect to the allocation or spread of an assessment against those properties specially benefitted. We suppose that it is sufficient that the spread be "fair".[66] The traditional approach has been the "frontage" basis,[67] but it has

been subject to much criticism.[68] As Thorne and Lucansky indicate, recent Illinois decisions have strongly approved the use of other factors (such as zoning and highest and best use), creating the possibility for truly equitable apportionment of a special assessment.

2. Herein of in-kind Consideration

If a shoreline erosion control project is a local improvement, and if a special assessment is levied against riparian property, the result is an obligation on the land to pay that assessment, usually over some number of years.[69] The question now is whether the public agency making the improvement may demand in-kind consideration--an easement or a building restriction--in lieu of cash.

Several problems are presented here. The first, and the most obvious one is that the value of the special benefit may bear no relation to the value of the easement or building restriction sought. Second, whatever the value of the special benefit, it will more likely than not be payable in installments. However, those installments do have a present, even if discounted, value.

The real issue is whether the process may be short-circuited or consolidated from the following approach:

1. Public authority makes improvement
2. Public authority levies special assessment
3. Public authority condemns easement
4. Public authority pays for easement
5. Landowners pays for special assessment

into a synthesized:

1. Public authority makes improvement
2. Public authority levies special assessment
3. Public authority condemns easement
4. Public authority pays difference between the value of the easement and the present value of the special assessment (or if the present value of the special assessment exceeds the

value of the easement, the special assessment is modified and reduced accordingly).

The problem is clear: may the special assessment procedure and the eminent domain procedure be consolidated. There is a great reluctance to do this.[70] Each procedure is set out in its own carefully detailed statute or statutes and each has become encrusted with the effect of literally hundreds of decisions. But it is not impossible. Where the construction of an improvement requires a taking or damaging of land, the statutes provide for a joint or combination proceeding.[71] Furthermore, offsets are clearly allowed, at the landowner's option, between condemnation awards and special assessments.[72]

This procedure is not useful for present purposes. The execution of an erosion control project does not require the taking of an easement for public beach use or a restriction against any development so as to protect scenic or open space values. But certainly the foregoing illustrates that a consolidation could be provided for by appropriate legislation. The question, in short, is one of offsets with respect to which the public authority, not the landowner, would have the option as to how to proceed. Certainly, it could simplify matters.

Summary

The underlying policy issue in this Chapter is the right of the public to recapture socially-created value. To the extent that the Illinois courts will recognize the fundamental importance and significance of that right, then the question asked at the outset of this Chapter will be (with appropriate legislation) in the affirmative. We must note again how the Coastal Zone Management concept requires us to rethink and reformulate and ultimately to champion and defend, broader and more inclusive notions of public rights. We saw this in connection with the police power and the public trust[73] and, now, once again in connection with the right to recapture public value. That all of these issues should converge is not surprising--the commonalities are clear. The real task is how we choose to go forward.

FOOTNOTES

1. The subdivision exaction theory would not appear to be useful because an exaction, land or fees in lieu thereof, may be had only when the landowner seeks permission to subdivide. For our purposes; therefore, one cannot wait until a landowner should decide to avail himself of the benefit of recording a subdivision plat pursuant to a plan of development. The same argument can be made with respect to planned unit development or other types of incentive zoning: exactions may not be had unless and until the landowner decides to do something. See, generally, "Lake Michigan" Part III. Local improvements, on the other hand, may be decided upon in most instances regardless of whether the affected landowners concur or approve of the particular projects.

2. A comprehensive analysis of local improvement law and procedure can be found in Thorpe and Lucansky, Special Assessment and Special Service Areas, (1972). There will be no attempt here to duplicate their rigorous treatment of the question, and the reader is encouraged to review their work. Our concern here will be with the particular question posed--can a shoreline erosion control project be deemed to be a local improvement. We will touch upon some of the matters considered by Thorpe and Lucansky but from a different perspective, one shaped by the question at hand here.

3. Ill. Const. (1970) Art. VII §§6(1) and (7).

4. Ill. Rev. Stat., ch. 24 §§9-2-1 et seq. (1975).

5. See Thorpe and Lucansky, supra. n. 2 for an excellent discussion of this matter. We note at this point that the impact of home rule is not totally resolved as to whether the procedure set out in the Municipal Code, S.H.A. c. 24 §§9-2-1 et seq. must be followed. See Thorpe and Lucansky, supra. n. 2 at pp. 21-9 et seq.

6. Ill. Rev. Stat., ch. 24 (1975).

7. 149 Ill. 310 (1894).

8. Loeffler v. City of Chicago, 246 Ill. 43 (1910); City of Belleville v. Miller, 339 Ill. 360 (1930).

9. Hundley v. Lincoln Park Commissioners, G7 Ill. 559 (1873).

10. Wilson v. Board of Trustees of the Sanitary District of Chicago, 133 Ill. 443 (1890).

11. Ewart v. Village of Western Springs, 180 Ill. 318 (1899); City of springfield v. Spring Ry. Co., 296 Ill. 17 (1921).

12. Hughes v. City of Momence, 163, Ill. 352 (1896); O'Neil v. People, 166 Ill. 561 (1897); Village of Downers Grove v. Bailey, 325 Ill. 186 (1927).

13. Village of Glencoe v. Hurford, 317 Ill. 203 (1925).

14. City of Waukegan v. DeWolf, 258 Ill. 374 (1913); Louisville and Nashville R. Co. v. City of East St. Louis, 134 Ill. 656 (1890).

15. I.C.R.R. Co. v. City of Decatur, 154 Ill. 173 (1894); Enos v. City of Springfield, 113 Ill. 65 (1885).

16. City of Chicago v. Law, 114 Ill. 569 (1893). A note of caution must be injected here. To find that a public activity constitutes the making of an improvement is only the first of several hurdles that must be overcome.

17. In re Petition of Village of Long Grove, 104 Ill. App. 2d 421, 423 (1969). See, also, City of Elmhurst v. Rohmeyer, 297 Ill. 430 (1921); Northwestern University v. Village of Wilmette 230 Ill. 80 (1907).

18. Village of Downers Grove v. Bailey, 325 Ill. 186, 191 (1927). See, also City of Waukegan v. DeWolf, 258 Ill. 374 (1913); City of Belleville v. Miller, 339 Ill. 360 (1930); City of Springfield v. Spring Ry. Co., 296 Ill. 17 (1921).

19. Loeffler v. City of Chicago, 246 Ill. 43 (1910); Village of Glencoe v. Hurford, 317 Ill. 203 (1925).

20. Loeffler v. City of Chicago, 246 Ill. 43, 52 (1910).

21. The narrow rule is clearly the preferable one, in our opinion. Possible abuses arising from overbearing or overreaching governments can be adequately protected against.

22. 297 Ill. 430 (1921). Cf. Fisher v. City of Chicago, 213 Ill. 268 (1904).

23. 180 Ill. 318 (1899).

24. In a similar vein, but as to water works, see, e.g., Hughes v. City of Momence, 163 Ill. 535 (1896).

25. 144 Ill. 569 (1893).

26. 144 Ill. at 576-7.

27. Shades of the Lake Michigan diversion cases! See "Lake Michigan" at pp. VII-23 et seq.

28. See "Lake Michigan" at pp. VII-16 et seq.

29. The fact that the Commissioners of Lincoln Park got into trouble with outdated contracts may be due to the peculiarities of the situation. But those difficulties do not affect the legal character of the road once the Legislature passed the necessary legislation. See "Lake Michigan", supra. n. 28.

30. See "Lake Michigan" at pp. VII-30 et seq.

31. Cf., Hundley v. Lincoln Park Commissioners, supra. n. 9.

32. We must do so, even though the soundness of the rule is subject to question.

33. Thorpe and Lucansky, supra. n. 2 at p. 21-28.

34. City of Chicago v. Law, 144 Ill. 569 (1893).

35. Illinois has had a tradition of doing things in or to Lake Michigan without getting the requisite federal approvals. Fortunately, we believe that unfortunate history has written its final chapter.

36. Thorpe and Lucansky, supra. n. 2 at p. 21-9.

37. Thorpe and Lucansky, ibid., do not appear to consider the precise question of the joint exercise of the authority. Our conclusion is based on an interpretation of Art. VII §§6(1) and (7) of the Illinois constitution. It may also be noted that if our reading is correct then the 1970 Constitution effectively overrules Loeffler v. City of Chicago, 246 Ill. 43 (1910) to the extent that opinion held that joint exercise of the authority is violative of the 1870 Constitution.

38. Ill. Const. (1970) Art. VII §§6(i), 7.

39. Ill. Const. (1970) Art. VII §8.

40. See discussion of Shore Erosion Protection Districts, infra.

41. People ex rel. Honefenger v. Burris, 408 Ill. 68 (1951).

42. Id. at 76.

43. See e.g., Ill. Rev. Stat. ch. 32 §284.1 (1973).

44. See, Ill. Rev. Stat. ch. 42 §346 (1973).

45. See e.g., Ill. Rev. Stat. ch. 42 §398 (1973).

46. See e.g., Ill. Rev. Stat. ch. 105 §9-1d (1973).

47. Compare, Ill. Rev. Stat. ch. 42 §228 (1973) with Ill. Rev. Stat. ch. 111 2/3 §§505, 512 (1973).

48. 390 Ill. 389 (1945).

49. Id., at 391-392.

50. People v. Hollis, 35 Ill. 2d 489 (1966).

51. In re Assessment by Village of Chicago Ridge, 27 Ill. App. 3d 1027 (1975).

52. See, e.g., Ill. Rev. Stat., ch. 10, §65 (1975).

53. See "Lake Michigan", Part IV; and see the statutes discussed therein at pp. VII-29 et seq. In order to preserve the possibility that shoreline erosion control project provided special benefit any statute would have to be carefully drafted or worded on this point.

54. Wilson v. Board of Trustees of the Sanitary District of Chicago, 133 Ill. 443 (1890). See, also, Thorpe and Lucansky, supra. n. 2 at pp. 21-7 to 21-8; and See e.g. S.H.A. ch. 24 §9-2-5.

55. Most of the lawsuits arise on challenges, filed by landowners as to the amount of the special assessment, see, e.g., Ewart v. Village of Western Springs, 180 Ill. 318 (1899) or, more commonly, to any assessment at all on the ground that the improvement is not local, see, e.g., Village of Downers Grove v. Bailey, 325 Ill. 186 (1927).

56. Village of Downers Grove v. Bailey, 325 Ill. 186 (1927). Thorpe and Lucansky go so far as to suggest that failure to so proceed might raise an equal protection argument. Ibid. n. 2 at p. 21-8. Query if the same unfairness exists where a series of improvements is made by general taxation and it is decided to finance further improvements by special assessment. If this argument seems familiar, it ought to. It is frequently raised by developers challenging subdivision exactions. Since developers frequently lose this argument (at least outside of Illinois, see "Lake Michigan" at pp. III-32 et seq.), perhaps the unfairness is not as great, at least in those cases where those now obligated to pay special assessments or special taxes are "newcomers" who have not been subject to previous general taxes to pay for the earlier improvements.

57. Ibid. n. 2 at p. 21-25.

58. One of the problems in the law of special assessments is the measurement and qualifications of special benefit. The special benefit must be determined at a specific point in time yet when the landowner sells the benefitted land some time subsequently, the "benefit" may have completely disappeared, or, on the other hand, been found to have been vastly underestimated. Cf. Walker, Taxation of Law Value Increases, Tax Policy (1971) quoted in Hagman, Urban and Land Development (1973) at pp. 805-6. But it is necessary to make such calculations in other areas as well as such cases involving the partial taking or damage to land. The dilemna, one supposes, is simple enough; how to measure the market value (usually thought of as involving the sales price) of something to be determined before it is sold or at least offered for sale. See, also, n. 50, supra.

59. Ibid. n. 2 at p. 21-28.

60. Ibid. n. 2 at p. 21-28.

61. See, n. 48, supra.

62. See, p. 165 supra.

63. See, p. 166 supra.

64. See, e.g., Hagman, n. 45, at pp. 774-810.

65. See, e.g., n. 45.

66. See, Ewart v. Village of Western Springs, 180 Ill. 318 (1899).

67. Thorne and Lucansky, n. 2 at pp. 21-25 and 21-26. This approach simply means that the portion of the cost of an improvement to be paid for by special assessment is divided by the total number of frontage feet. That dividend is then multiplied by the number of frontage feet of a particular parcel in order to calculate that parcel's special assessment. We suppose that such an approach could be used with the Lake Michigan shoreline.

68. Ibid. n. 54.

69. Thorne and Lucansky, n. 2 at p. 21-24.

70. Cf., City of Baldwin Park v. Stoskus, 503 p. 2d 1333 (Cal. 1972).

71. Thorne and Lucansky, n. 2 at p. 21-64.

72. Ibid., at p. 21-68.

73. See, generally, "Lake Michigan."

CHAPTER X--CONCLUSION
MANAGEMENT IN THE ILLINOIS COASTAL AREA:
AN OPPORTUNITY FOR PARTNERSHIP

1. Toward A Management Program

The Illinois Coastal Zone Management Program's purposes, pursuant to the Coastal Zone Management Act of 1972,[1] are to preserve, protect, develop, and where possible, restore and enhance the resources of Lake Michigan and the Illinois shorelands of Lake Michigan for this and succeeding generations. In order to best accomplish these broad purposes, the concept of "management" embodied in the Act's title is a key element encompassing not only traditional regulatory applications to land and water resources but the application of all of the management tools available to state and local government, including, but not limited to:

a. Planning;
b. Property acquisition and disposition;
c. Facilities development and maintenance;
d. Financing;
e. Administrative programs providing ongoing services;
f. Technical and monetary assistance to others for their programs;
g. Research and monitoring; and
h. Regulation and enforcement.[2]

The development of a viable and implemental program--one acceptable to the federal Office of Coastal Zone Management and the Secretary of Commerce, to the Governor[3] and to the local units of government on the Lake Michigan shore[4]--requires a true partnership between the State on the one hand and the shoreline municipalities on the other. Certainly the legal analysis suggests nothing less.

A state/local partnership will, at the least:

> encourage and assist local governments in the development and implementation of local land and water use management programs to ensure wise use of Lake Michigan and the Illinois shorelands;[5]
>
> restate the responsibilities of the State of Illinois regarding issues of greater than local concern in the management of the Illinois jurisdiction of Lake Michigan (i.e. the public trust resources) and those shorelands the uses of which have direct and significant impact on coastal waters;[6] and

> establish procedures and techniques to facilitate intergovernmental cooperation among and between State and local entities.[7]

The proposed partnership offers a unique opportunity for State and local governments to share and coordinate with minimal interference by the state government in the traditional municipal affairs.

2. The Framework

a) The Federal Level

Some perspective on the Program's position vis-a-vis means of management is critical. The Coastal Zone Management Act of 1972 is specific in requiring a State wishing to be eligible for program implementation funds to establish programs at the State level for matters of greater than local significance.[8] These programs include:

> a. Special procedures for evaluating land use directions, such as the siting of regional energy facilities, which may have a substantial impact on the environment.[9]
>
> b. A method for assuring that local land and water use controls in the coastal zone do not unreasonably or arbitrarily restrict or exclude those uses of regional benefit.[10]

In the words of the Office of Coastal Zone Management:

> The Coastal Zone Management Program is mandated to . . . the establishment of a coherent state structure and process for managing coastal resources.[11]

One of the earliest analysts of the problems of this country's coastal shorelines noted the failure of existing institutional arrangements to deal with shoreline problems adequately.[12] This failure was a critical finding of the Act itself. The Act provides the conclusion and, perhaps, the model for development of an institutional framework in which proper management is possible:

> In light of the competing demands and the urgent need to protect and give high priority to natural systems in the coastal zone, present State and local institutional arrangements for planning and

> regulating land and water uses in such areas are inadequate; and the key to more effective protection and use of the land and water resources of the coastal zone to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments with Federal and local governments and other vitally effected interests and developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.[13]

What are these "models" for management? The Act suggests a minimum of three broadly stated forms. All three which follow mandate state government to assume a more vital role in the management process. Thus, prior to funding approval for state programs under Section 306 of the Act, the Secretary of Commerce is required to find that the state program provides for one or a combination of three very basic management models:

> 1. State establishment of standards and criteria for local implementation, subject to administrative review and enforcement;
>
> 2. Direct state land use and water use planning and regulation; or
>
> 3. A program for state administrative review to determine consistency with the management program of all local and regional development plans, projects or land and water use regulation proposed by any state, regional or local management authority or private developer, with the State retaining power to approve or disapprove.[14]

In its own analysis, the Washington Office of Coastal Zone Management has concluded:

> Under Section 306 . . . , a state may use 'any one or a combination of' the three control techniques there prescribed. The state must select its method or methods, support it or them with specific and adequate legislative authority, and set forth the means for control and review in the coastal zone management program. This review process

> is intended to ensure the integrity of the coastal zone program and to assure that state goals for matters of regional or national concern are not thwarted by local action either intentionally or simply by inability to deal with complex land and water use problems. Under the Act, the state's responsibility in local affairs need go no further.[15]

The Illinois Program in selecting as a means of management alternatives a "state/local partnership" has attempted to recognize the real limitations on both the role of the State and that of local government in management process within the context of northeastern Illinois. Those matters of particularly local concern, those matters which pertain solely and exclusively to the government and affairs of municipalities,[16] should and must remain under local control.[17] Those matters of greater than local concern require treatment and management at a greater than local level.[18] Thus, a determination of which needs are to be given priority in the emerging coastal zone is an analysis that cannot be made institutionally at all by a single unit of local government--it is an analysis that requires a true partnership.

Thus, in opting for a "hybrid" of the management formats--a partnership heavily weighted to local government responsibility--the Illinois Program has rejected as untenable any invasions of matters of only local concern. The basis of the partnership will be in the emerging statutory or regulatory definition of "matters of local concern"--a definition that is embryonic in Illinois today.[19]

b) The Illinois Context

It has become almost a cliche to report that the State of Illinois has more governmental authorities at the local level--both general purpose and special purpose--than any other state in the United States.[20] Given this vast multiplication of jurisdictions, it follows that along the Lake Michigan shore--the Illinois jurisdiction of which extends but 59 miles and is one of the shortest shorelines in the nation--there exist a diversity of governments exercising or having the potential to exercise control of the Lake, its waters and its shore. With the existing array of management authorities created by the legislature and Constitution and now in competition on this most valuable local, State and national resource, potential for debacle will exist until the management authority is coordinated through a partnership arrangement.

The Program's research activities highlight the complexity of the intergovernmental arrangements and competing governmental jurisdictions in the Illinois Lake Michigan shoreline area.[21] A few examples should suffice:

1. There are fourteen municipalities authorized to exercise some twenty-three separate, distinct management functions;[22]

2. There are a myriad of local, special purpose units of government--such as local sanitary districts, park districts and port districts--exercising no less than twelve distinct management functions;

3. There are region-wide[23] special purpose government authorities and agencies--including the Northeastern Illinois Planning Commission, the Metropolitan Sanitary District of Greater Chicago, counties, soil and water conservation districts and the like--exercising a minimum of fourteen management functions by statute;

4. We have laws qua laws such as the Intergovernmental Cooperation Act,[24] the Open Lands Acquisition Act[25] and similar statutes in the State[26] which could, will and do impact upon the shoreline; and

5. Illinois has no less than fifteen state agencies and commissions ranging from the Department of General Services to the Department of Registration and Education imposing by statutory authority no less than twenty-seven distinct and separate functions impacting on the Lake and its shore.

On top of this are superimposed the management functions of federal agencies and statutes which, in many instances, merely reinforce the duplication found at state level.

This multiplicity of governmental structures responsible for various types and levels of control in the coastal zone presents significant obstacles to effective resource management. This dispersal of management authority and the redundancy of management effort may hinder prompt solutions to critical problems. Conflicts of jurisdiction and authority further complicate the situation. Also, there are some problems that, despite the institutional overlapping, are simply not recognized or may be inadequately addressed. The matrix (Chart 1) which follows illustrates both the overlap and gap areas by management function and agency in Illinois.

CHART #1 SUMMARY CHART OF EXISTING MANAGEMENT ACTIVITIES IN THE COASTAL AREA

RESOURCE MANAGEMENT FUNCTIONS		PRINCIPAL[7] UNITS OF GOVERNMENT	FEDERAL							STATE						MULTI-STATE		REGIONAL AND LOCAL					
			Army Corps of Engineers	Dept. of Commerce[1]	Environmental Protection Agency	Housing & Urban Development[2]	Dept. of Interior[3]	Dept. of Transportation[4]	Dept. of Conservation	Business & Economic Development	Environmental Protection Agency	Dept. of Local Government Affairs	Dept. of Registration & Education[5]	Dept. of Transportation[6]	Great Lakes Basin Commission	Great Lakes Commission	Northeastern Ill. Planning Comm.	Lake and Cook Counties	Shoreline Municipalities	Shoreline Park Districts	Sanitary Districts (MSD, NSSD)	Port Districts & Authorities
A. COMMERCIAL PORTS AND HARBORS	1.	Management of commercial navigation	3 467	8				145 678		145 7				467	16	17					3	1
	2.	Commercial port development and management	All	56	8		67	234		157	678		67	678	167	7	17	All	All		135	All
B. WATER SUPPLY AND QUALITY	3.	Inland surface water resource management	All		8	145 678	67		67				67	All	156		16	1234 578	1234 578		234 56	
	4.	Water supply and diversion of water from Lake Michigan	67	67	7					17			7	167 8	157		17	234 5	234 5		35	
	5.	Water quality and liquid waste management	578	7 156	145 678		456 73	148	5	7	145 678	147	7	673	156		167	All	All	All	All	123 4
C. AIR RESOURCES	6.	Air pollution control			156 78						145 678											
D. ENERGY RESOURCES	7.	Energy research and development		56	78		67				78			23	156						23	
E. LAND USE	8.	Preservation of historic and cultural sites		56		4	123 467		123 47				7				1	234	234 8	234		
	9.	Comprehensive land use planning and areawide development programs		56		456	467		17	17		147		667	157		167	145 67	145 67	145 67		14
	10.	Land use regulation		56	67		67							146 8	156		17	All	All	147		
	11.	Land transportation facilities development	123 47		67			All	28	157				All	6		1	All	All	123 48		12
F. LAND/WATER INTERFACE	12.	Construction activities along coast, including erosion control	All	56	78		67	8	1345 678	147	678	147	67	1345 678	156		6	All	All	All	234 9	All
G. RECREATIONAL RESOURCES	13.	Fisheries and wildlife management	78	15 67	78		All		All	17	78		67	167	156						57	
	14.	Open space and facilities development and management	23	56		456	All		All	1				126 78	6		167	All	All	1234 567	24	
	15.	Recreational harbor development and management	134 678		8		234 7		123 47		8	147		68	6			All	All	All		

MANAGEMENT TOOLS:

1 = Planning
2 = Property acquisition and disposition
3 = Facilities development and maintenance
4 = Finance
5 = Administrative and service programs
6 = Technical and monetary assistance
7 = Research and monitoring
8 = Regulation and enforcement

What is the sum and substance of this ever-increasing multiplication of functional, jurisdictional authority? The institutional framework within which Lake Michigan exists inside the Illinois boundary consists of no less than forty governments exercising no less than one hundred management activities. The examples of jurisdictional overlap and conflict abound. The examples of duplication in jurisdictional authority, in permit authority, in regulatory authority, in land acquisition and facilities development authority bespeak the need for not less than the coordination that a partnership will produce.

Although examples of the breakdown in regulatory enforcement by reason of jurisdictional redundancy abound, several citations to particular problems are apt to point to the need for coordination.

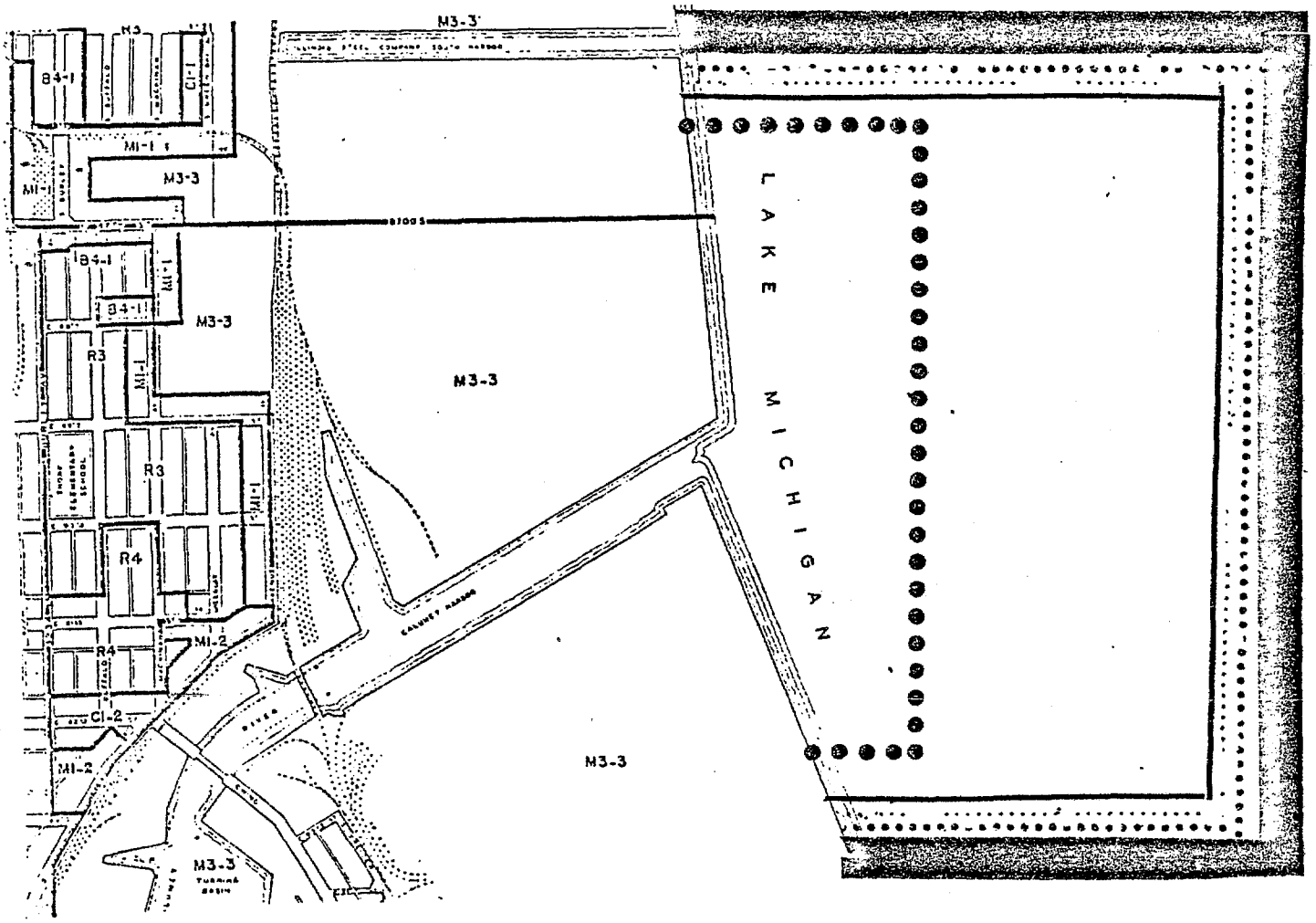
1. In 1967, the Illinois General Assembly provided that, in addition to municipal approval, prior to county recording the State must approve all subdivision plats for land on the Lake Michigan shore.

   No person shall offer or present for recording or record any subdivision plat of any lands bordering on or including any public waters of the State in which the State of Illinois has any property rights or property interests, unless such subdivision plat is under the seal of a registered Illinois Land Surveyor and is approved by the . . . (Division of Water Resources).[27]

   Recent plat activities of at least one shoreline community[28] indicates a lack of attention to the statutory mandate by both municipalities and counties and, for that matter, the State.

2. Within a single section of the Lake, as illustrated on Chart 2, not less than seven (7) governmental units and agencies within the State alone exercise some form of police power, regulatory control over navigation and water use-related activities--the General Assembly having granted coextensive jurisdictions to each of the units cited--even though, in every conceivable instance in which the lake would be used, the State retains final authority.

CHART 2



BOUNDARIES:

- State (DOT)
- City
- Port
- Park Dist
- MSDGC
- EPA
- County

3. Present statutory and home rule authority for the management of construction activities along the shore (including erosion hazard control) could involve at least the following agencies and units of government in an advisory, review or regulatory capacity:

   a. The affected municipality (with possible input from other "downshore" municipalities);[29]

   b. United States Army Corps of Engineers;[30]

   c. United States Department of Commerce;[31]

   d. U.S. E.P.A.;[32]

   e. U.S. Department of Interior;[33]

   f. U.S. Department of Transportation;[34]

   g. Illinois Department of Conservation;[35]

   h. IEPA;[36]

   i. Division of Water Resources (IDOT);[37]

   j. Illinois DLGA;[38]

   k. Great Lakes Basin Commission;[39]

   l. NIPC;[40]

   m. County with jurisdiction;[41]

   n. Park District with jurisdiction;[42]

   o. Sanitary District with jurisdiction;[43] and

   p. Port District with jurisdiction.[44]

Some of these governments merely review and comment--others have permit authority--but the impact for a developer (be it private or public) can be untoward through unintended delay in approval or rejection with consequent impacts upon financing of public as well as private improvements.

The proposed partnership will coordinate not only at the State and local levels but at the federal level as well, thus providing a critical expedition of the shoreline permit processes.

c) The Public Trust[45]

The sole areas of exclusive State jurisdiction today and as proposed in the Illinois state/local partnership are the public trust resources--the waters of Lake Michigan and the bed of the Lake. The public trust in the Lake and its bed is not a matter that can be delegated by the State,[46] but the input of local government into the trust administration can be made a reality through partnership.

As Chart 2 indicates, the State, through the General Assembly, has subdivided procedural jurisdiction over the public resource while retaining in the State the substantive control. Neither home rule nor the charter governments of Winnetka, Glencoe and Lake Forest[47] affect this ultimate trusteeship in the State. The trust, simply stated, is the obligation of the State to hold certain public resources for the use of all of the people of the State. Perhaps, the United States Supreme Court articulated the doctrine's meaning most succinctly in its landmark decision affecting the Illinois shore:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, then it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more comformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.[48]

Presently, the State administers the trust through the permit, flood plain and platting responsibilities of the Division of Water Resources.[49]

The State itself has not always in the past exercised its trusteeship with maximum diligence, but the proposed partnership will clearly focus the trusteeship, input local government perspectives into the enforcement and restate and underscore the statutory mandate that:

> [T]itle to the bed of Lake Michigan . . . is held in trust for the benefit of the Peoples of . . . Illinois and . . . the State [shall] jealously guard the same in order that the true and natural conditions thereof may not be wrongfully and improperly changed to the detriment and injury of the State of Illinois.[50]

d) Home Rule

Without equivocation, home rule offers to the Program a unique opportunity to innovate and expand upon the role of local government in the local/state partnership. The powers of home rule governments no longer rest, in Illinois, on state legislation but are enabled by a broad constitutional mandate:

> . . . a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare, to license, to tax; and to incur debt.[51]

Thus, as this Report concludes,[52] even home rule units were limited in the exercise of their powers to matters pertaining to their local government and affairs--just as are non-home rule units and chartered towns and villages. Further, the Illinois Constitution of 1970 specifically mandated that environmental matters were of State concern--an area where the Illinois Supreme Court has held that legislation of even a home rule unit " . . . must conform with the minimum standards established by the legislature."[53]

It can be concluded from the history of home rule in Illinois to date that a determination of whether local action falls within the province of its "government and affairs," the impact of the local action must be considered. If the result affects only the municipality itself, with no extra-territorial impacts or affects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality alone. However, if the result is not so confined in impact or affect, it becomes a matter for the legislature.

The partnership concept flows from these built-in restraints on local government action. The public trust resources, those matters of greater than local concern, those actions of local government which ex-

clude regional interests, uses which have a direct and significant impact on the public trust resource--all are presently beyond any single local unit's management authority. Yet, tnrough partnership effectively created and executed, local government enters into the management framework not only of matters purely local but in the regional sense as well.

3. Rules Applied--The Emerging Partnership

a) The Lake Area

As indicated on Chart 3, the Lake Area--a "Public Trust Zone" as proposed would be defined in the traditional essence of the doctrine--the waters and bed of Lake Michigan. Within this district, the State, as is the case today, would, through a streamlined permit process, manage all activities. The partnership would, however, contemplate a local government and regional agency clearinghouse process for all permit applications with a strict timetable.[54] In addition to referral to affected units of local government and the Northeastern Illinois Planning Commission, the State's Division of Water Resources would also refer matters within its jurisdiction to affected agencies at the State level.

Thus, notwithstanding the final permit-issuing or finding agency at the State level, all applications for permits or financial assistance requiring State action would be made through the Division whose obligation it will be to coordinate and see the process through to conclusion.

The existing permit process is both cumbersome and confusing. In addition, it is without a time restraint on the issuing body, thus open-ended.[55] The Program will attempt, through the State Coastal Zone Inter-Agency Task Force,[56] to obtain agreements with State level agencies on reasonable time limits for permit decisions within an administrative process that is consistent agency-by-agency.

In addition to a coordinated permit process for the Public Trust Zone within the State hierarchy of governments, the Division will attempt to coordinate permit and funding applications through the Federal level as well. Thus, a single application, through the Lake Michigan Management Section of the Division of Water Resources, will be processed with the requisite State and Federal agencies whose review, comment and approval is required under law. For an example of how the process might operate in practice, see Chart 4 following.

The legislation or regulations, as the case may be, implementing the management of the Lake Area would clearly articulate and codify the mandate of the Illinois Supreme Court that proposed uses of public trust

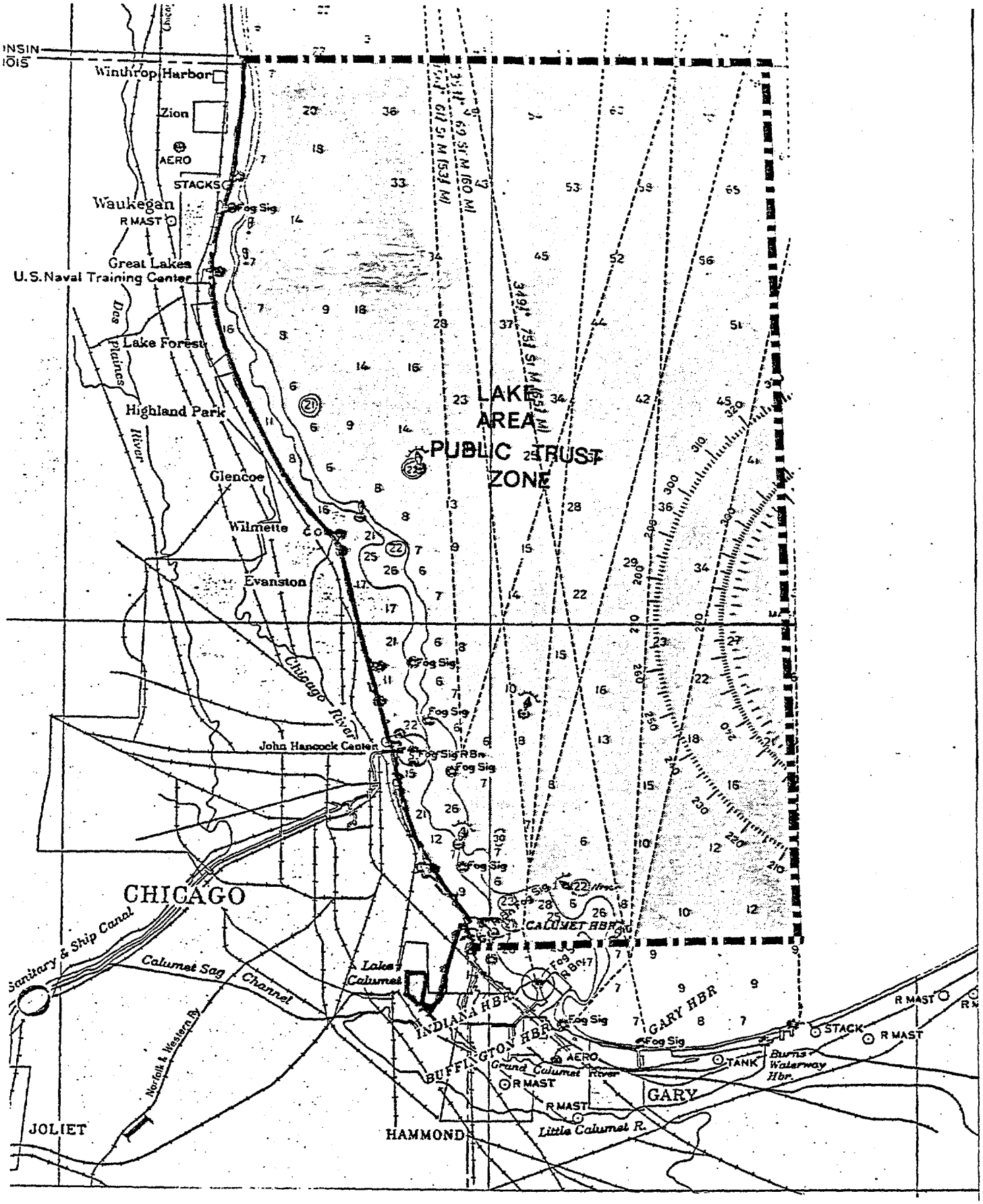
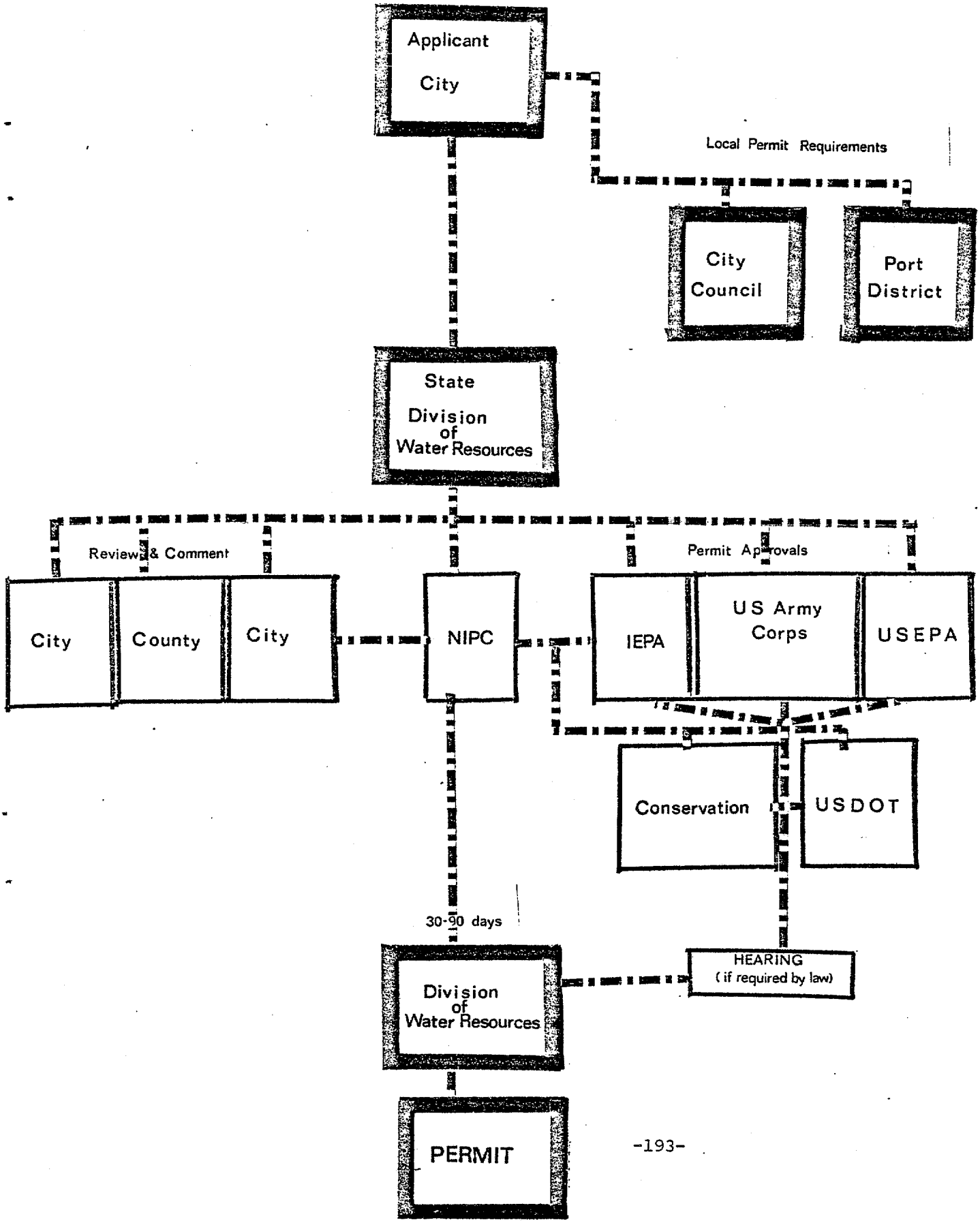

Winthrop Harbor
Zion
AERO
STACKS
Waukegan
R MAST
Fog Sig
Great Lakes
U.S. Naval Training Center
Lake Forest
Des Plaines River
Highland Park
Glencoe
Wilmette
Evanston
LAKE AREA PUBLIC TRUST ZONE
Chicago River
John Hancock Center
Fog Sig R Bn
CHICAGO
Sanitary & Ship Canal
Calumet Sag Channel
Lake Calumet
CALUMET HBR
Fog R Bn
INDIANA HBR
BUFFINGTON HBR
GARY HBR
Grand Calumet River
AERO
TANK
Burns Waterway Hbr.
R MAST
STACK
GARY
Norfolk & Western Ry
JOLIET
HAMMOND
Little Calumet R.
State Boundary
Zone Boundary

CHART 3

CHART 4

PERMIT PROCESS: LAKE FILL



lands would be approved only pursuant to conditions clearly demonstrating: (1) that public bodies would control use of the area in question, (2) that the area would be devoted to public purposes and open to the public, (3) the diminution of the area of original use would be small compared with the entire area; (4) that none of the public uses of the original area would be destroyed or greatly impaired; and (5) that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility.[57]

In summary, though the State's exercise of management powers in the Lake Area would be exclusive, the state/local partnership would, at the least:

(a) Provide for coordination at local, state and federal levels of government;

(b) Provide a single focus for permit applications rather than the confusing "door to door" process of today;

(c) Establish set time frames within which permits would be reviewed, analyzed and approved or denied;

(d) Establish an administrative process for local government and regional input so that all local and regional facts are considered; and

(e) Codify the conditions of the public trust.

b) The Shore Area (SA)

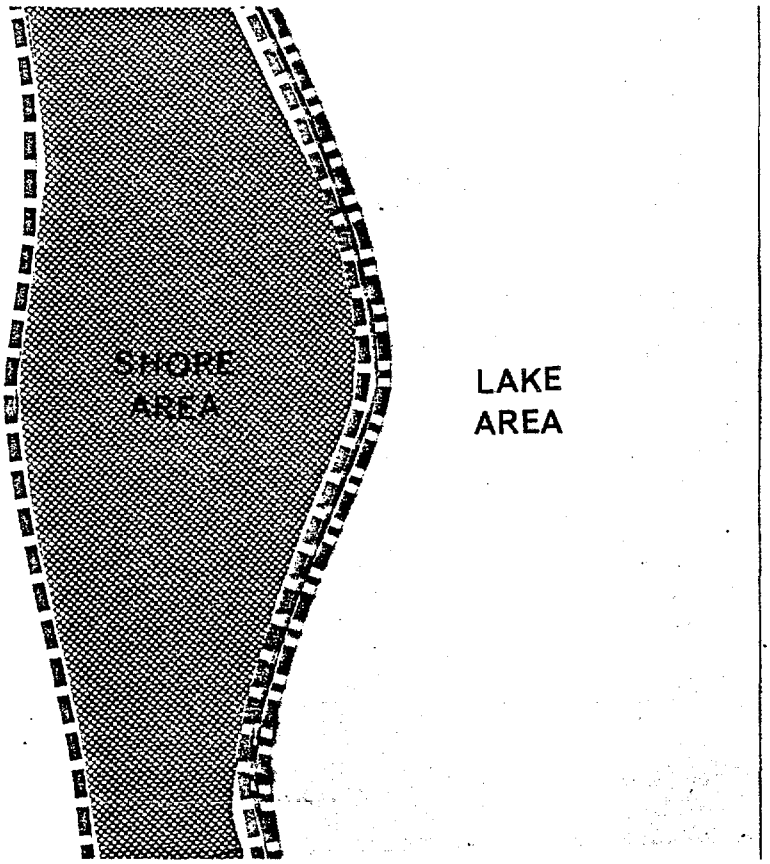
As illustrated within the hypothetical boundaries on Chart 5, inland of the Lake Area would be critical environment zone identified as the Shore Area--a land area adjacent to and impacting upon the Lake Area and requiring the application of both state and local management tools. The criteria for the hypothecated boundary would be that the land within the SA be:

(a) Shoreline adjacent; and

(b) Within the still water line of the 100 year flood in the coastal area flood plain; or

(c) Within the 100 year recession line for erosion hazard areas.

CHART 5
A CRITICAL ENVIRONMENT ZONE

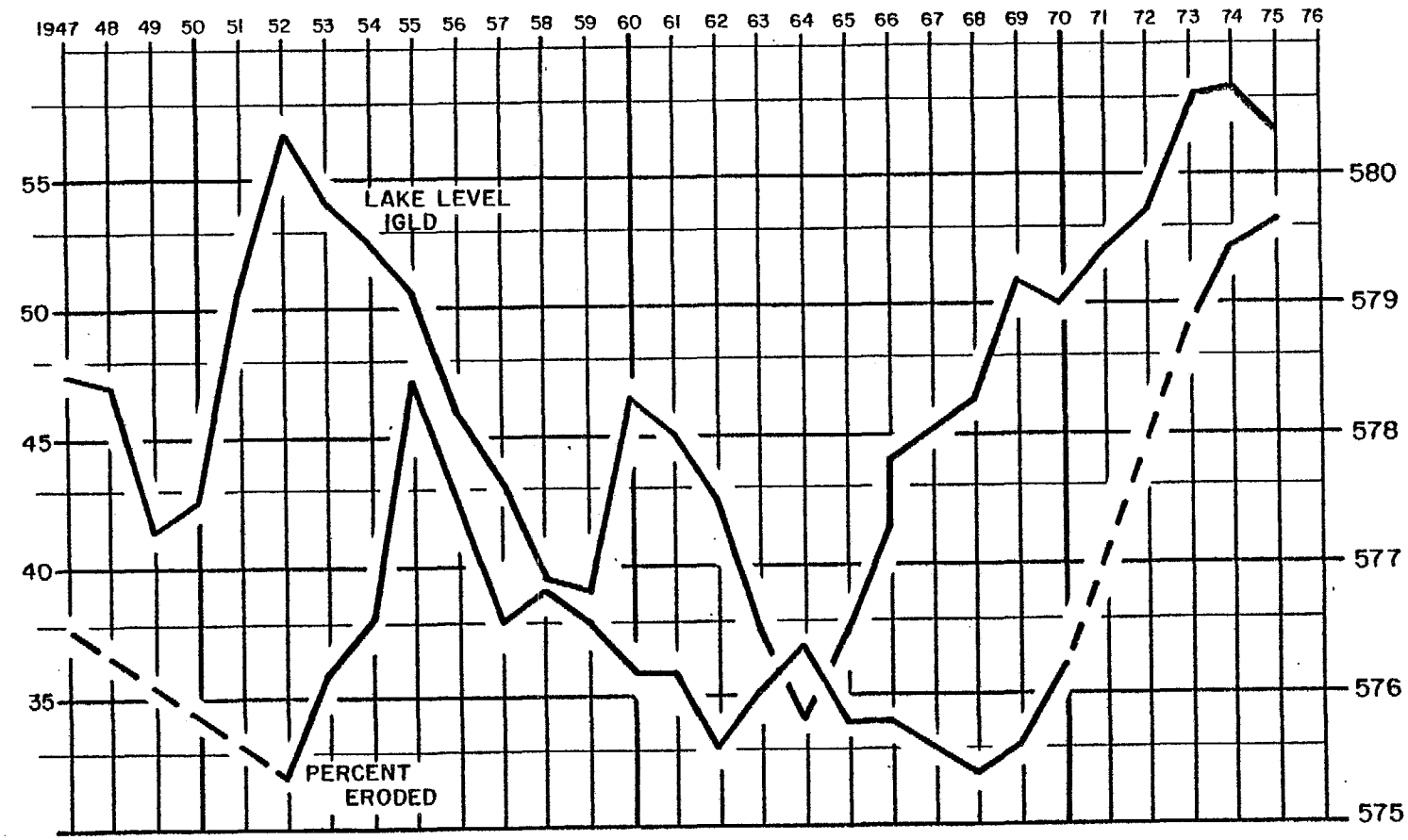


That shoreline area subjected to a Shore Area designation by local government would be the critical example of the "partnership."

The State presently has, pursuant to its authority to coordinate and plan for the protection of flood prone areas[58] in addition to its permit issuance authority,[59] adequate power to regulate flood plains. The Department of Transportation, Division of Water Resources, is charged with the authority, at the present time, to issue permits for any construction within the flood plain.[60] Pursuant to other statutory authority, the Division is empowered to undertake construction, reconstruction, maintenance and other similar land development work to protect flood prone areas.[61] Thus, not only can the State take measures to construct flood control operations, it presently has the right through regulation to limit other construction--the two strongest tools in the regulatory, management process. The Department's flood plain regulatory and management powers[62] bespeak a partnership arrangement in that the existing statutory authority directs the Department to take into consideration the management requirements of other units of government.[63] Buttressing the State role in the management of flood plains is the public trust doctrine itself. The waters in the coastal flood plain are, ipso facto, coastal waters. The pollutants that enter Lake Michigan from the recession of flood waters are within the ambit of the public trusteeship imposed on the State by the doctrine. Erosion hazard areas fall within the flood prone area definition. Chart 6, prepared by the Illinois Geological Survey, exemplifies the relationship between lake level and erosion--with erosion reaching an undeniable peak with the peaking of lake levels this year. In many areas, the causes of flooding and erosion are identical: the wave action of the Lake on the land, thus the management can be consistently applied. There can be no doubt under the court decisions interpreting the public trust doctrine in Illinois[64] and elsewhere[65] that land standing adjacent to or near navigable waters exists in a special relationship to the State and therefore may be required to undergo state regulation and management.

How then can a partnership serve both the interests of local and state government in the Shore Area? It is proposed that by legislation the General Assembly establish minimum standards for the SA with implementation by local government. Municipalities would then be given both a time frame in which to develop management techniques for this area and the funds, pursuant to Section 306 of the Coastal Zone Management Act of 1972, with which to apply the technical expertise necessary to implement the management program. A municipality--a general purpose unit of government[66]--developing a CZM Program would submit that program to the Division of Water Resources, Lake Michigan Management Section, for certification that the minimum Program standards have been met. Once certified, local government--not the State as is now the case--would be responsible for issuing permits for construction, development and use

CHART 6 - - LAKE LEVELS & EROSION



within the Shore Area. The State, rather than issue permits in these areas, would analyze the permit process on an annual basis to determine that the actions taken under the certified program are in conformity therewith. Any amendments to the comprehensive Program regulations would similarly require certification by the Division. Because of the fragile nature of the land within the proposed Shore Area, should a municipality fail to take such action to develop minimum standards and a regulatory process within the time frame mandated by legislation, the State would be required to adopt and enforce the same. To do less would deprive the comprehensive program of its vitality and would violate the spirit as well as the intent of the Coastal Zone Management Act of 1972 and, thereby, deprive the overall Program of funding. Many affected units of government already have comprehensive flood plain regulations (e.g., Highland Park[67]) and others have already determined that the lake front is a critical resource deserving of different and special attention beyond that of other areas (e.g., the City of Chicago[68]). Thus, under the partnership process the following would sequentially occur:

(a) The State would mandate the establishment of Shore Areas and would establish minimum standards for the management of the critical environmental resources herein;

(b) Within an established time frame municipalities would create an SA setting standards meeting the minimum mandated by the state legislation or going beyond;

(c) The Division of Water Resources would then certify the local government action as meeting the State minimum standards (or, in the alternative, in the event that a municipality elected not to participate, the Division would establish said standards);

(d) The unit of local government (or the Division in the event that a unit of local government did not establish minimum standards) would enforce its management techniques with periodic reports to the Division.

Thus, in the truest sense, a partnership could be achieved whereby the state interests would be protected through minimum standards and local administration would be the focus. This would create along the Lake Michigan shore an atmosphere of local action that does not now exist in the area of flood plain regulation and, through local action, the regional and state and national interests could be assured.

c) The Inland Area (IA)

Through the recommended Coastal Zone Program process, the management of resources beyond the still water flood plain line and the 100 year recession line of hazard prone areas is also feasible and desirable. Thus, the management program would require that local governments, in their local management programs presented for certification, adequately manage those uses with a direct and significant impact on the Lake, its shore, waters and bed. The uses within this Inland Area which would be required to be managed would include, but not be limited to the following:

(a) Uses which deposit storm water in coastal waters;

(b) Uses which encroach upon the Shore Area;

(c) Uses which cause sediment to enter coastal waters;

(d) Uses which impact upon access to coastal waters or uses which have direct access to coastal waters;

(e) Uses which utilize the surface of coastal waters; and

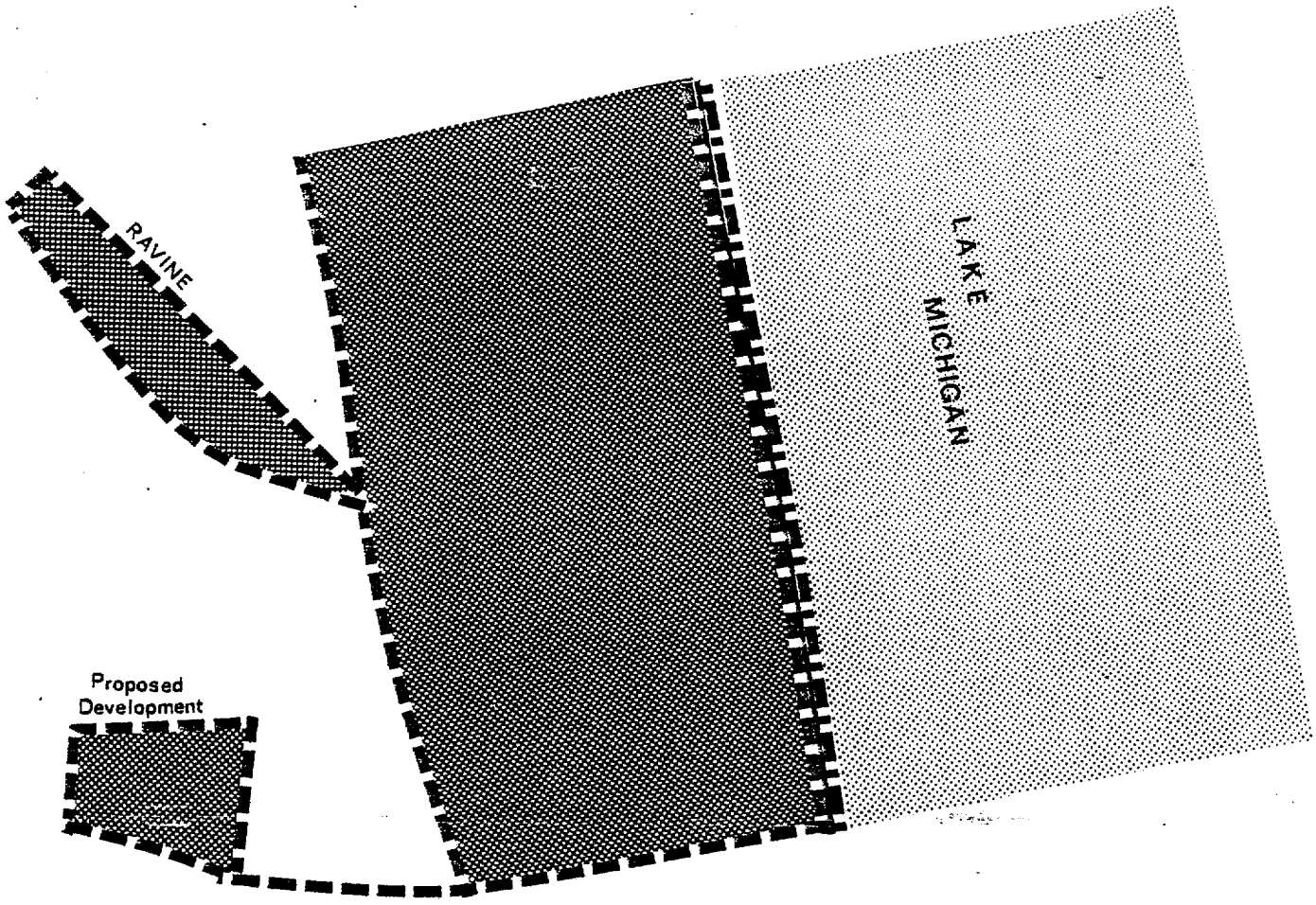
(f) Uses which affect currents or littoral drift.

As indicated on Chart 7, these uses may or may not be directly adjacent to the LA or SA but would be included within the Program for purposes of management. Through the concept of the Program management process--so integral to the local/state partnership proposal--the State may be assured that uses of greater than local concern are being managed on a coordinated basis through the establishment of minimum state standards for the treatment thereof while at the same time, local government will continue to implement the management program on a day-to-day basis.

4. Conclusion

The development of a viable State program of Coastal Zone Management grows from a series of perceptions: perceptions of need, perceptions of power, perceptions of space. The "opportunities for partnership" to which this Chapter is addressed grows out of the legal perception of where legal power resides and where that power should, in fact, be vested. Given the legal restraints on the exercise of home rule authority, given the doctrine of the public trust, given the panoply of

CHART 7



KEY

LA
Coast
SA

police power regulatory techniques in place in northeastern Illinois and the interplay of governments within the coastal communities--a partnership is possible and desirable. This Report bespeaks its need.

F O O T N O T E S

1. 16 U.S.C.A. §§1451-1464; 15 C.F.R. Pts. 920-26.

2. Zile, A Legislative--Political History of the CZMA, 1 CZM Journal 236 (1974) (hereinafter "Zile").

3. See, Hershman, Achieving Federal--State Coordination in Coastal Resources Management, 16 Wm. & Mary L. Rev. 747 (1975); see, also, 16 U.S.C.A. §1455.

4. This recognizes the political realities of an urbanized shoreline. See, also, Zile, supra., n. 2.

5. 16 U.S.C.A. §1454(b); 15 C.F.R. Pt. 923.13-923.16.

6. See, e.g., First Year Work Product, ICZMP, Vol. I, ch. IV; and 16 U.S.C.A. §1453(a); and Robbins and Hershman, Boundaries of the Coastal Zone: A Survey of State Laws, 1 CZM Journal 305 (1974).

7. 16 U.S.C.A. §1452-1453, See, Hershman and Folkenroth, Coastal Zone Management and Intergovernmental Coordination, 54 Ore.L.Rev. 13 (1975).

8. 16 U.S.C.A. §1454(b).

9. 16 U.S.C.A. §1455(c).

10. 16 U.S.C.A. §1454.

11. OCZM, Draft Threshold Paper #6 "ORGANIZATION" p. 1 (1976).

12. Ducsik, SHORELINE FOR THE PUBLIC (1974).

13. 16 U.S.C.A. §1451.

14. 16 U.S.C.A. §1455(e).

15. OCZM, Draft Threshold Paper #7: "AUTHORITIES," p. 3 (1976).

16. See, e.g., CH. II, supra.

17. Ibid.

18. Id.

19. Id.

20. See, e.g., Report to Governor, Commission on Urban Area Government (1972).

21. The authors have prepared a research document for the ICZMP--PRESENT MANAGEMENT AND PLANNING ACTIVITIES--LAKE MICHIGAN AND ITS SHORE: A WORKING COMPENDIUM that highlights the jurisdictional morass (hereinafter "Compendium").

22. Compendium, supra, n. 21, V.I.

23. The "region" is the Chicago SMSA as defined by the U.S. Bureau of Census.

24. Ill.Rev.Stat., ch. 127 §§741, et seq. (1975).

25. Ill.Rev.Stat., ch. 85 §§2101-2111 (1975).

26. See, Compendium, supra., n. 21, V.I., Index I.

27. Ill.Rev.Stat., ch. 115 §13 (1975).

28. The Village of Glencoe in conjunction with the "Bronner Subdivision" in 1975.

29. Ill.Rev.Stat., ch. 24 §11-123-9 (1975).

30. See, e.g., 33 U.S.C.A. §1344; NRDC, Callaway, 7 E.R.C. 1784 (1975).

31. 16 U.S.C.A. §§1451-1464.

32. 33 U.S.C.A. §1344; and 33 U.S.C.A. §§1341.

33. 33 U.S.C.A. §1165.

34. 14 U.S.C. §2, §63a5 (1975).

35. Ill.Rev.Stat., ch. 105 §468 (1975); ch. 127.

36. Ill.Rev.Stat., ch. 19 §61a (1975).

37. Ill.Rev.Stat., ch. 19, §§65-65e incl. (1975).

38. Ill.Rev.Stat., ch. 127 §63b14.14 (1975).

39. Ill.Rev.Stat., ch. 127 §§192.1--192.4, incl. (1975).

40. Ill.Rev.Stat., ch. 85 §§1101 et seq. (1975).

41. Ill.Rev.Stat., ch. 34 §3103 (1975).

42. Ill.Rev.Stat., ch. 105 §§11.1-2 & 11.1-3 (1975).

43. E.g., Ill.Rev.Stat., ch. 42 §§326 et seq. (1975); ch. 42 §299 (1975).

44. E.g., Ill.Rev.Stat., ch. 19, §§179-192, incl. (1975).

45. See, n. 6, supra.

46. Ibid.

47. Chartered prior to the 1870 Illinois Constitution.

48. Illinois Central Railroad Company v. Illinois, 146 U.S. 387 at 453, 454 (1892).

49. See, e.g., Ill.Rev.Stat., ch. 19 §§65-65f, incl. (1975).

50. Ill.Rev.Stat., ch. 19 §71 (1975), and, also, Ill.Rev.Stat., ch. 19 §54 (1975) reading:

"It shall be the duty of the Department of Transportation to have general supervision of every body of water within the State of Illinois wherein the State or the people of the State have any rights or interests whether the same be lakes or rivers, and at all times to exercise a vigilant care to see that none of said bodies of water are encroached upon or wrongfully seized or used by any private interest in any way, except as may be provided by law and then only after permission shall be given by said department, and from time to time for that purpose, to make accurate surveys of the shores of said lakes and rivers, and to jealously guard the same in order that the true and natural conditions thereof may not be wrongfully and improperly changed to the detriment and injury of the State of Illinois."

51. Ill. Const. Art. VII §6.

52. See, Chapter II, supra.

53. City of Chicago v. Pollution Control Board, 59 Ill. 2d 484 at 489 (1974).

54. The Illinois Environmental Protection Agency is presently the only factor in the permit process with a time restraint.

55. This has been a major complaint of public bodies.

56. Established by informal agreement.

57. As found in Paepcke v. Public Building Commission, 46 Ill. 2d 330, at 343, 344 (1970).

58. Ill.Rev.Stat., ch. 19 §65f (1975).

59. Ill.Rev.Stat., ch. 19 §65 (1975).

60. Ill.Rev.Stat., ch. 19 §65f (1975).

61. Ill.Rev.Stat., ch. 19 §§126a--128.3, incl. (1975); ch. 42 §§481 & 482 (1975).

62. Ibid.

63. Ill.Rev.Stat., ch. 19 §65f (1975).

64. Supra, n. 6.

65. Ibid.

66. See, Ill. Const. Art. VII §1.

67. See, ch. , supra.

68. Ibid.

LAKE MICHIGAN AND CHICAGO LAKEFRONT PROTECTION ORDINANCE.

Passed By
The City Council of the City of Chicago
October 24, 1973.

WHEREAS, The waters and environs of Lake Michigan are one of the greatest natural assets of the City of Chicago; and

WHEREAS, Over the years the city administrations have made such great efforts to insure a pure and plentiful water supply as digging a 28 mile channel to reverse the flow of the Chicago River and creating the world-famous Metropolitan Sanitary District; and

WHEREAS, The City has developed by land-fill the 20 mile long stretches of beach and shoreline enjoyed to this day by millions of persons—residents and visitors; and

WHEREAS, Traditionally Chicagoans have used their Lakefront for such myriad recreational pursuits as swimming, boating, water sports, picnicking, bicycling, horseback riding, scenic walks and rest areas; and

WHEREAS, No other Great Lake city has shown the same kind of concern or initiative to achieve, preserve, and develop its Lakefront potential for aesthetic and recreational purposes; and

WHEREAS, The foregoing has been accomplished at the same time that the city's port facilities have been expanded to make it the world's largest inland port; and

WHEREAS, Fourteen Basic Policies for the preservation and improvement of this priceless heritage, exemplified in The Lakefront Plan of Chicago, have been approved by the Chicago Plan Commission, and the Commissioners of the Chicago Park District, and adopted by the City Council; and

WHEREAS, The people of the City of Chicago have a personal interest in preserving this incomparable asset and this concern has been demonstrated by every generation of its citizens; now, therefore,

Be It Ordained by the City Council of the City of Chicago:

SECTION 1. Pursuant to the provisions of the Constitution of the State of Illinois of 1970, the Municipal Code of Chicago is hereby amended by adding a new chapter thereto, to be numbered 194B and known as the Lake Michigan and Chicago Lakefront Protection Ordinance, as follows:

Article I—Declaration of Intent.

194B-1. Lake Michigan and the Lakefront of the City of Chicago are hereby designated a district having special environmental, recreational, cultural, historical, community, and aesthetic interests and values. It is the express legislative intention of this Ordinance to insure the preservation and protection of that district and of every aspect of its interest and value.

Article II—Title.

194B-2. This chapter 194B, Sections 194B-1 through 194B-9.2, shall be entitled and referred to as "The Lake Michigan and Chicago Lakefront Protection Ordinance".

Article III—Purposes.

194B-3. This Ordinance is adopted for the following purposes:

(a) To promote and protect the health, safety, comfort, convenience, and the general welfare of the people, and to conserve our natural resources;

(b) To identify and establish the Lake Michigan and Chicago Lakefront Protection District and to divide that District into several zones wherein any and all development or construction, as specified in Article V hereinafter, shall be specifically restricted and regulated;

(c) To maintain and improve the purity and quality of the waters of Lake Michigan;

(d) To insure that construction in the Lake or modification of the existing shoreline shall not be permitted if such construction or modification would cause environmental or ecological damage to the Lake or would diminish water quality; and to insure that the life patterns of fish, migratory birds and other fauna are recognized and supported;

(e) To insure that the Lakefront Parks and the Lake itself are devoted only to public purposes and to insure the integrity of and expand the quantity and quality of the Lakefront Parks;

(f) To promote and provide for continuous pedestrian movement along the shoreline;

(g) To promote and provide for pedestrian access to the Lake and Lakefront Parks from and through areas adjacent thereto at regular intervals of one-fourth mile and additional places wherever possible, and to protect and enhance vistas at these locations and wherever else possible;

(h) To promote and provide for improved public transportation access to the Lakefront;

(i) To insure that no roadway of expressway standards, as hereinafter defined, shall be permitted in the Lakefront Parks;

(j) To insure that development of properties adjacent to the Lake or the Lakefront Parks is so designed as to implement the above-stated purposes, provided, however, that with respect to property located within the Private Use Zone as established by Articles V, VI, and IX of this Ordinance, the permitted use, special use, lot area per dwelling unit, and floor area ratio provisions of The Chicago Zoning Ordinance, Chapter 194A of the Municipal Code of Chicago, shall govern except where such provisions are in substantial conflict with the purposes of this Ordinance or the Fourteen Basic Policies of the Lakefront Plan of Chicago;

(k) To achieve the above-stated purposes, the appropriate public agency should acquire such properties or rights as may be necessary and desirable;

(l) To define and limit the powers and duties of the administrative body and officers as provided herein;

(m) Nothing contained in the Lake Michigan and Chicago Lakefront Protection Ordinance shall be deemed to be a waiver or consent, license or permit to use any property or to locate, construct or maintain any building, structure or facility or to carry on any trade, industry, occupation or activity which may be otherwise required by law.

Article IV—Rules and Definitions.

194B-4.1. *Rules.* In construing this Ordinance, the rules and definitions contained in this Article shall be observed and applied, except when the context clearly indicates otherwise;

(a) Words used in the present tense shall include the future; the words used in the singular number shall include the plural number, and the plural the singular.

(b) The word "shall" is mandatory and not discretionary.

(c) The word "may" is permissive.

(d) Where the regulations imposed by any provision of this Ordinance are either more restrictive or less restrictive than comparable regulations imposed by any other provision of this Ordinance or of any other law, ordinance, resolution, rule or regulation of any kind, the regulations which are more restrictive (or which impose higher standards or requirements) shall govern.

(e) In their interpretation and application, the provisions of this Ordinance shall be held to be the minimum requirements for the promotion of the public health, safety and welfare.

(f) This Ordinance is not intended to abrogate any easement, covenant, or any other private agreement, provided that, where the regulations of this Ordinance are more restrictive (or impose higher standards or requirements) than such easements, covenants, or other private agreements, the requirements of this Ordinance shall govern.

(g) "Him", "he", or "his" means and includes both the male and female gender.

194B-4.2. *Definitions.*

(a) *Accessory Building*—An accessory building is one which is subordinate to and serves in principal building; and which is subordinate in area, extent, or purpose to the principal building; and which contributes to the comfort, convenience or necessity of occupants of the principal building; and which is located on the same zoning lot as the principal building.

(b) *Applicant*—An applicant is the owner of the subject property or a duly authorized representative.

(c) *Expressway*—An expressway is any primary highway constructed as a freeway which has complete control of access and is designed for speeds in excess of 45 miles per hour.

(d) *Public Agency*—A public agency is any agency of the United States Government, State of Illinois, any county, township, district, school, authority, municipality, or any official, board, commission, or other body politic or corporate or subdivision of the State of Illinois, now or hereafter created, whether herein specifically mentioned or not.

(e) *Public Open Space*—A public open space is any publicly owned open area including, but not limited to, parks, playgrounds, beaches, waterways, parkways, and streets.

(f) *Public Way*—A public way is any sidewalk, street, alley, highway, or other public thoroughfare.

(g) *Use*—The use of property is the purpose or activity for which the land, or building thereon, is designed, arranged, or intended, or for which it is occupied or maintained, and shall include any manner or performance of any activity which is regulated by any other provision of the Municipal Code of Chicago.

(h) *Zoning Lot*—A zoning lot is a single tract of land located within a single block, which (at the time of filing for a building permit) is designated by its owner or developer as a tract to be used, developed, or built upon as a unit, under single ownership or control. Therefore, a zoning lot may or may not coincide with a lot of record.

Article V—Lake Michigan and Chicago Lakefront Protection District.

194B-5.1. *Prohibitions.* It shall be unlawful for any physical change, whether temporary or permanent, public or private, to be undertaken, including, but not limited to, landfill, excavation, impoundment, mining, drilling, roadway building or construction of any kind, within the Lake Michigan and Chicago Lakefront Protection District, as hereinafter set forth in sub-paragraphs 194B-5.2 and 194B-5.3, or for any acquisition or disposition of real property by a public agency, whether by sale or lease, or other means, to be consummated within the Lake Michigan and Chicago Lakefront Protection District, as hereinafter set forth in subparagraphs 194B-5.2 and 194B-5.3, without first having secured the approval therefor from the Chicago Plan Commission as provided in Article VI of this chapter; provided, however, that the following shall be exempt from the prohibition aforestated: improvements on any property subject to a Planned Development Ordinance adopted prior to the effective date of this Ordinance; accessory buildings; repairs and rehabilitation which do not exceed fifty (50) percent of the total cost of replacement of the existing structure; additions which do not increase the site coverage or the height of the structure; and residential structures containing not more than three dwelling units.

194B-5.2. *District.* The Lake Michigan and Chicago Lakefront Protection District shall be comprised of all of that part of Lake Michigan that lies within the State of Illinois south of the northern limits of the City of Chicago as extended eastward; all the shoreline of the City of Chicago including all harbors, piers, breakwaters, and the locks of the Chicago River; all the system of public open space and public ways which comprises the Lakefront Parks; and all lands contained within the Private Use Zone set forth in the District maps illustrated in Article IX of this Ordinance, attached hereto and made a part hereof.

194B-5.3. *Zones.* The Lake Michigan and Chicago Lakefront Protection District shall be divided into three zones:

(a) The Off-Shore Zone shall include all surface, subsurface and air-rights areas of Lake Michigan to a distance eastward to the east line of the State of Illinois lying in Lake Michigan.

(b) The Public Use Zone shall include all public open space and public ways irrespective of configuration which are adjacent to the Shoreline of Lake Michigan as set forth in the District maps illustrated in Article IX of this Ordinance.

(c) The Private Use Zone shall include all zoning lots contained within the Private Use Zone set forth in the District maps illustrated in Article IX of this Ordinance, attached hereto and made a part hereof.

[District Maps attached to this ordinance printed on pages 6492 to 6525 of this Journal]

Article VI—Administration.

194B-6.1. The Chicago Plan Commission shall be the agency responsible for the administration of the Lake Michigan and Chicago Lakefront Protection Ordinance and shall have the following powers and duties in addition to those powers and duties presently contained within the Municipal Code of Chicago:

(a) To receive from any applicant or public agency an application, on such forms as the Commission may provide, to undertake any landfill, excavation, impoundment, mining, drilling, roadway building or construction regulated by this Ordinance and receive from any public agency an application, on such forms as the Commission may provide, to acquire or dispose of property regulated by this Ordinance; to review, approve or disapprove said application, provided that (1) a public hearing is noticed and held in accordance with the provisions of subparagraphs (b), (c), (d) and (e) hereof, and (2) a written report is prepared and filed with the Commission by the Commissioner of the Department of Development and Planning in accordance with the provisions of paragraph 194B-6.2 hereof. The forms provided by the Commission shall not require detailed working drawings or plans.

(b) Within seven (7) days from the date of receipt of said application, the Commission shall schedule a public hearing on the question of same setting forth a date within sixty (60) days thereof, time and place and causing written notice to be given the transmitting public agency and the applicant. The Commission shall cause a legal notice to be published in a newspaper of general circulation in the City of Chicago setting forth the nature of the hearing, the property involved and the date, time and place of the scheduled public hearing. Said public hearing shall be scheduled on a date not less than fifteen (15) days nor more than thirty (30) days from the date of publication of notice.

(c) In addition to the notice requirements hereinabove provided, each applicant subject to the provisions hereof shall, not more than thirty (30) days before filing said application, serve written notice, either in person or by certified or registered mail, return receipt requested, on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of Cook County; provided, that the number of feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided, further, that in no event shall this requirement exceed 400 feet. Said notice shall contain the address of the subject property, a brief statement of the nature of the application, the name and address of the applicant and the statement that the applicant intends to file said application on an approximate date. If, after a bonafide effort to determine such address by the applicant, the owner of the property on which the notice is served cannot be found at his or its last known address, or the mailed notice is returned because the owner cannot be found at the last known address, the notice requirements of this provision shall be deemed satisfied. In addition to serving the notice herein required, at the time of filing application, the applicant shall furnish to the Commission a complete list containing the names and last known addresses of the owners of the property required to be served, the method of service employed and the names and addresses of the persons so served and said applicant shall also furnish a written statement to the Commission certifying that the requirements hereof have been complied with. The Commission shall hear no application unless the applicant furnishes the list and certificate herein required.

(d) The Commission shall conduct the public hearing as provided by subparagraph (b) hereof and shall provide a reasonable opportunity for all interested parties to express their opinions under such rules and regulations as the Commission shall adopt for the purpose of governing the applications and proceedings of the Commission. Each speaker at any hearing shall be fully identified as to name, address and interests which he represents. Said public hearings shall be concluded within thirty (30) days after commencement thereof; provided, however, that the Commission may grant such extensions of time as the applicant may request, said extensions of time to be deemed a waiver of the thirty (30) day period herein provided to the extent of the continuance granted.

(e) The Commission shall make a determination with respect to the proposed application, plan, design or proposal in writing within thirty (30) days after the hearings are concluded and shall notify the forwarding public agency and the applicant of the Commission's approval or disapproval thereof, setting forth findings of fact constituting the basis for its decision. The decision of the Chicago Plan Commission shall be made in conformity with the purposes for which this Ordinance is adopted as set forth in Article III hereof, as well as the Fourteen Basic Policies contained in the Lakefront Plan of Chicago adopted by the City Council on October 24, 1973. The decision of the Chicago Plan Commission shall be deemed a final order and binding upon all parties. Failure of the Commission to make a determination within the time hereinabove prescribed shall be deemed a disapproval.

(f) Whenever possible and practicable any hearings required by law to be held by the Commission affecting the same property shall be held concurrently.

194B-6.2. The Commissioner of the Department of Development and Planning shall have the following duties and responsibilities:

(a) To forward every proposal or application submitted to the Chicago Plan Commission under the provisions of this Ordinance to the Department of Environmental Control and to any other public agency he shall deem appropriate.

(b) To receive from the Commissioner of Environmental Control, and any other public agency, a report of comments or recommendations.

(c) To make such investigation relative to each application or proposal as he deems necessary.

(d) To prepare and forward to the Chicago Plan Commission a written report which shall include his findings and recommendations on each application or proposal no less than five (5) days prior to the scheduled hearing.

(e) To forward within five (5) days to the Chicago Plan Commission certain applications for a permit, as specified in Section 194B-5.1 of this Ordinance, in any Planned Development located within the Lake Michigan and Chicago Lakefront Protection District.

(f) To forward within five (5) days to the Chicago Plan Commission such applications for permit not exempted in Section 194B-5.1 of this Ordinance and not in any Planned Development located within the Lake Michigan and Chicago Lakefront Protection District, and to return to the Commissioner of Buildings such applications as are exempted by Section 194B-5.1 of this Ordinance.

(g) To receive the decision of the Chicago Plan Commission prior to the issuance of any permit and to consider that decision binding.

(h) To approve all applications for permits as specified in Section 194B-5.1 of this Ordinance when said permits conform to the decision of the Chicago Plan Commission.

194B-6.3. The Commissioner of Buildings shall have the following duties and responsibilities:

(a) To forward within five (5) days to the Chicago Plan Commission and the Commissioner of Development and Planning any application for a permit in the Lake Michigan and Chicago Lakefront Protection District, together with a statement of zoning considerations by the Zoning Administrator, at any location within the Lake Michigan and Chicago Lakefront Protection District.

(b) To receive the decision of the Chicago Plan Commission, and the approval of the Commissioner of Development and Planning, prior to the issuance of any permit and to consider that decision binding.

194B-6.4. The Commissioner of Environmental Control shall, upon receipt of any proposal or application as hereinabove provided, conduct an investigation of the ecological and environmental impact of said proposal and forward his findings to the Commissioner of Development and Planning in writing within the earliest feasible period of time after receipt thereof.

194B-6.5. Any public agency that proposes to acquire or dispose of any real property whether by sale or lease, or other means, or proposes a physical change including but not limited to landfill, excavation, impoundment, mining, drilling, roadway building or construction of any kind, whether permanent or temporary, within the Lake Michigan and Chicago Lakefront Protection District, shall forward that proposal to the Chicago Plan Commission not less than ninety (90) days, nor more than 365 days prior to the initiation of the action proposed.

Article VII—Penalties and Remedies.

194B-7.1. Any person found guilty of violating, disobeying, omitting, neglecting, or refusing to comply with, or resisting or opposing the enforcement of any of the provisions of this chapter, except when otherwise specifically provided, upon conviction thereof shall be punished by a fine of not less than Fifty Dollars ($50.00) nor more than Three Hundred Dollars ($300.00) for the first offense and not less than Two Hundred Dollars ($200.00) nor more than Five Hundred Dollars ($500.00) for the second and each subsequent offense in any 180-day period; provided, however, that all actions seeking the imposition of fines only shall be filed as quasi-criminal actions subject to the provisions of the Illinois Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, pars. 1 et seq.). Repeated offenses in excess of three (3) within any 180-day period may also be punishable as a misdemeanor by incarceration in the county jail for a term not to exceed six (6) months under the procedure set forth in Section 1-2-1.1 of the Illinois Municipal Code (Ill. Rev. Stat. 1971, ch. 24, par. 1-2-1.1) and under the provisions of the Illinois Code of Criminal Procedure (Ill. Rev. Stat. 1971, ch. 38, pars. 100-1, et seq.), in a separate proceeding. A separate and distinct offense shall be regarded as committed each day upon which each person shall continue any such violation, or permit any such violation to exist after notification thereof.

194B-7.2. Notwithstanding the provisions of subparagraph 7.1 hereof, in the event any structure or building, landfill, excavation, impoundment, mining or drilling has been undertaken in violation of this chapter, the City of Chicago may institute appropriate legal or equitable proceedings to prevent the completion or maintenance of said unlawful undertaking.

Article VIII—Severability.

194B-8. If any provision, clause, sentence, paragraph, section, or part of this chapter, or application thereof to any person, firm, corporation, public agency or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be unconstitutional or invalid, said judgment shall not affect, impair or invalidate the remainder of this chapter and the application of such provision to other persons, firms, corporations, public agencies, or circumstances, but shall be confined in its operation to the provision, clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person, firm, corporation, public agency, or circumstances involved. It is hereby declared to be the legislative intent of the City Council that this chapter would have been adopted had such unconstitutional or invalid provision, clause, sentence, paragraph, section, or part thereof not been included.

Article IX—District Maps.

194B-9.1. The location and boundaries of the District and its three zones established by this Lake Michigan and Chicago Lakefront Protection Ordinance are shown upon the following District maps which are hereby incorporated into this Lake Michigan and Chicago Lakefront Protection Ordinance. The said District maps, together with everything shown thereon and all amendments thereto, shall be as much a part of this Lake Michigan and Chicago Lakefront Protection Ordinance as is fully set forth and described herein.

194B-9.2. (1) Where District boundary lines are indicated as following streets or alleys or extensions thereof, such boundary lines shall be construed to be the center lines of said streets or alleys or extensions thereof.

(2) Where District boundary lines are indicated as adjoining railroads, such boundary lines shall be construed to be the boundary lines of the railroad rights of way, unless otherwise dimensioned.

(3) Where District boundary lines are indicated as adjoining expressways such boundary lines shall be construed to be the boundary lines of the expressway rights of way, unless otherwise dimensioned.

(4) Dimensioned District boundary lines shown on the maps are intended usually to coincide with lot lines. Where a dimensioned boundary line coincides approximately but not exactly with a lot line which existed on the effective date of incorporation of such boundary line into the map(s), the said boundary line shall be construed to include the said lot affected.

SECTION 2. This ordinance shall take effect on and after ten days from the date of its due passage and publication.